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In the Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1970

No. [redacted] 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

On Appeal from the United States District Court for the Southern District of Florida

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	2
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	3
The Questions are Substantial	5
Proof of Service	9
Appendix A	App. 1
Appendix B	App. 9
Appendix C	App. 11
Appendix D	App. 21
Appendix E	App. 23

TABLE OF CITATIONS

	Page
Abington School District v. Schempp, 374 U.S. 203 (1963)	7
Central Baptist Church of Miami v. Dade County, Fla., 216 So.2d 4	3, 4
Engel v. Vitale, 370 U.S. 421 (1962)	8
Everson v. Board of Education, 330 U.S. 1 (1947)	7
Gibbons v. District of Columbia, 116 U.S. 404 (1886)	7
McCollum v. Board of Education, 333 U.S. 203 (1948)	7
Murray v. Curlett, 374 U.S. 203 (1963)	8
Walz v. Tax Commissioner of the City of New York, __ U.S. __, 25 L.Ed.2d 697, 90 S.Ct. __, (1970)	5

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JURISDICTIONAL STATEMENT

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Appellants appeal from the opinion and final judgment of the three judge United States District Court for the Southern District of Florida, entered on October 5, 1970, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the three judge United States District Court for the Southern District of Florida is not yet reported. Copies of the opinion of the three judge United States District Court, together with the Final Judgment have been attached hereto as Appendix A & B.

JURISDICTION

This suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, and §1983 of 42 U.S.C. to enjoin the governmental tax exemption pertaining to the commercially utilized income producing real property owned by the defendant Central Baptist Church of Miami, Florida, Incorporated. A three judge United States District Court was convened pursuant to 28 U.S.C. §2281 and §2284. The opinion of the three judge United States District Court was entered on August 21, 1970, and the Final Judgment of the Court in favor of the defendants was entered on October 5, 1970. Notice of Appeal and Amended Notice of Appeal to the Supreme Court of the United States was filed on September 18 and October 7, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., §1253.

QUESTIONS PRESENTED

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

STATUTES INVOLVED

F.S. 192.06 (3) and (4) as interpreted by **Central Baptist Church of Miami, Florida, Incorporated v. Dade County, Florida, 216 So.2d 4**, as set forth in Appendix C hereto.

STATEMENT

Appellants, who were the plaintiffs below filed suit in the United States District Court against the defendants, appellees below, as a result of the governmental tax exemption granted to one of the defendants, Central Baptist Church of Miami, Florida, Incorporated, by and

through the cooperation of the other defendants as it pertained to certain real property owned by the Central Baptist Church in Dade County, Florida. A Stipulation of Facts was entered into by the plaintiffs and the defendant Central Baptist Church. The following were included among the stipulated facts:

1. The defendant Central Baptist Church owned real property in Miami, Dade County, Florida which was being utilized six days and six evenings each week for a commercial profit making purpose as recognized in the opinion of the three judge United States District Court.

2. That the said commercial parking lot occupied approximately fifty-nine per cent of the church property.

3. That although this commercial parking lot operation brings in a substantial profit each year, the Dade County governmental authorities pursuant to F.S. 192.06 as interpreted by the Supreme Court of Florida in **Central Baptist Church of Miami, Florida, v. Dade County, Florida**, 216 So.2d 4, exempted the said commercial parking lot from taxation.

The Final Judgment was entered against the amended complaint filed by the plaintiffs which had charged violation of the First and Fourteenth Amendments to the United States Constitution by F.S. 192.06 (3) and (4) itself, on its face, and as interpreted, construed, and applied to the plaintiffs and all others similarly situated by the aforecited Florida Supreme Court decision. Plaintiffs herein also challenge the unconstitutional results obtained through the use of this statute wherein a profit making commercial parking lot is granted tax exempt status solely

as a result of its being owned by the defendant Central Baptist Church. The plaintiffs herein challenge only the commercial operated business, and not the property occupied by the church building itself. Stated another way, the amended complaint was not directed to the forty-one per cent of the property occupied by the church structures, but rather directed solely to the remaining fifty-nine per cent of the church owned real property maintained as a commercial parking lot six days and six nights of each week as stipulated to by the parties and as reflected in the opinion of the three judge United States District Court. Subsequent to the filing of motions for summary judgment and various briefs filed by the respective parties, the three judge U.S. District Court entered its opinion and thereafter its Final Judgment against the plaintiffs as to injunctive and other relief requested by the plaintiffs.

THE QUESTIONS ARE SUBSTANTIAL

The instant case was decided solely on the authority of **Walz v. Tax Commissioner of the City of New York**, 25 L.Ed.2d 697, 90 S.Ct. 1409. The Walz case pertained to property used exclusively for religious purposes, and the instant case pertains to property used as a commercial operation six days and six evenings of each week by the defendant Central Baptist Church of Miami, Florida. The U. S. District Court apparently had no difficulty in reconciling the distinct differences of the Walz case and the case at bar and, in fact, the following statement is made on page four of the opinion rendered by the three judge U. S. District Court in the instant case:

> "Read more broadly, **Walz** stands merely for the proposition that a state is free to provide any tax exemption scheme it wishes (as long as the classifications are not capricious or arbitrary) and that exemptions to houses of worship are included because they do not violate the religious clauses of the First Amendment.
> "**Walz** makes no attempt to define what kinds of property may or may not be encompassed by an exemption scheme except to say that property used solely for worship can be included. . . .
> "In short, there is nothing in the majority opinion in **Walz** which indicates that a state may not constitutionally construe its religious exemption statute to include church owned, commercially used property when the proceeds go solely to church projects."

Thus, the stage is set for the next ultimate question to be decided by this court. In **Walz**, this court apparently decided that the exclusively utilized religious property owned by a church can be exempt from ad valorem taxation without running afoul of the First and Fourteenth Amendments prohibiting the establishment of religion and guaranteeing equal protection of the laws. Now that **Walz** has been decided, the U. S. District Court has in the instant case extended the **Walz** decision to include the commercially operated businesses which happen to be owned by a church or a religious body within the tax exempt scheme. The U. S. District Court did, of course, mention the fact that the substantial profits of the commercial enterprise apparently go to church projects, but this in no way should decide the propriety of the constitutional prohibition on the establishment of religion.

Stated another way, the plaintiffs take the position that whether the church chooses to use the profits of a commercial business it owns for one use or another use is, as far as the constitutional propriety, totally irrelevant. The question simply is whether or not the profit making commercial businesses in this country, which happen to be owned by a religious body, can escape their lawful obligation to participate in the tax revenue collection of their communities. The appellants do not believe that the **Walz** decision stands for the proposition that the commercial property as well as the religious property can withstand the strictures of the establishment and equal protection clauses of the United States Constitution. Indeed, we shall go further and state candidly that to construe the First and Fourteenth Amendments as did the three judge United States District Court in the instant case is to make a mockery of the purposes intended by the applicable portions of the two constitutional amendments. Still further, it would appear that the decision of **Gibbons v. District of Columbia,** 1886, 116 U.S. 404 seems to be a limitation as cited in the opinion of the **Walz** case. The defendants argue and the U.S. District Court agrees that because the church apparently needs the parking lots for Sunday worshippers, this somehow should relieve the church for its taxation obligations pertaining to six days and six evenings of commercial operation of those same parking lots. The reasoning truly escapes us.

Your undersigned counsel does not believe that this Jurisdictional Statement is the place to dwell on the various cases interpreting the establishment clause such as **Everson v. Board of Education,** 330 U.S. 1 (1947), **McCollum v. Board of Education,** 333 U.S. 203 (1948), **Abington School District v. Schempp,** 374 U.S. 203 (1963),

Murray v. Curlett, 374 U.S. 203 (1963), and **Engel v. Vitale**, 370 U.S. 421 (1962). We would prefer to discuss these cases in a full brief on the merits and in oral argument before this Court. We do believe however that the questions presented in this case which have come about as an illogical extension of the **Walz** decision are without question very substantial and of great importance not only to Dade County, Florida, but to all regions of our country. Whether or not the commercial enterprises of religious organizations will also go tax exempt is a question which cries out for answering. We fervently hope that this Court will see fit to give the undersigned an opportunity to present a full brief and argue orally concerning the monumental importance and constitutional propriety of the issues at stake.

Respectfully submitted,

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By _____
Richard Yale Feder

PROOF OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Jurisdictional Statement were served by mail this _____ day of November, 1970 to: MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, 1600 First National Bank Building, Miami, Florida; THOMAS C. BRITTON, ESQ., Attention ST. JULIEN P. ROSEMOND, ESQ., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130.

RICHARD YALE FEDER
Attorney for Appellants
Member of the Bar of
the Supreme Court of
the United States

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 69-746-Civ-JE

FLORENCE DIFFENDERFER and
NISHAN PAUL,

Plaintiffs,

v.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Defendants.

Filed Aug. 21, '70

Before DYER, Circuit Judge, and MEHRTENS and EATON, District Judges.

DYER, Circuit Judge:

Plaintiffs, who are citizens and taxpayers of Dade County, Florida, seek in this action a declaration that F.S. § 192.06 (4) constitutes an establishment of religion and an inhibition on the free exercise of religion in violation of the First Amendment to the United States

Constitution insofar as it authorizes tax exemption of property of the Central Baptist Church used as a commercial parking lot.[1] They also seek an injunction ordering the Dade County Tax Collector to assess and collect taxes on that property. A three-judge was convened and the case was submitted on stipulated facts and plaintiff's motion for summary judgment. Decision was delayed pending the outcome of **Walz v. Tax Commission**, 1970, ____ U.S. ____ [No. 135, May 4, 1970], which held there is no violation of the First Amendment Religious Clauses in a state taxation scheme which exempts from taxation property "used solely for religious worship". In view of **Walz** we hold the Florida exemption scheme, as it applies to the Central Baptist Church parking lot, constitutional, we deny the motion for summary judgment and the declaratory and injunctive relief sought by the plaintiffs, and we enter judgment for the defendants.

F.S. § 192.06 provides in pertinent part:

> The following property shall be exempt from taxation:
>
> * * *
>
> (4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs

[1]Plaintiffs also attack the exemption of the church's parking lot on the ground that it unfairly discriminates against private operators of parking lots in the area, who are thereby put at a competitive disadvantage. Since it is not alleged that plaintiffs are themselves parking lot operators, there is no "injury in fact" to them sufficient to give them standing to raise this issue. *Data Processing Service v. Camp*, 1970, ____ U.S. ____ [No. 85, March 3, 1970, at p. 2 of slip opinion].

> and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property.

In a prior state case, **Central Baptist Church v. Dade County, Fla.**, Fla. 1968, 216 So.2d 4, Dade County attempted to tax that portion of the church property used as a parking lot. The church resisted successfully, the Supreme Court of Florida holding the lot exempt within the terms of the above quoted statute because it found:

> [T]he limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property.
>
> * * *
>
> The record conclusively reflects the church devotes the net income received by it from rentals of the commercial parking lot area to religious and educational purposes.

Id. at 6.

Among the facts which the parties have stipulated to are the following:

> All revenues generated from the parking area are used for religious, educational, literary, benevolent, fraternal and/or charitable activities of the church.

None of the expenses of operating the parking area are paid by or from the revenues generated by the parking area.

The church could not operate at its present location without the off-street parking spaces in its lot because of a local ordinance which requires auditoriums to provide a certain number of off-street parking spaces dependent upon seating capacity of the auditorium.

The parking spaces in the lot "are just as necessary for the operation of the Church as the roof over the Church Building."

The property in question is located in downtown Miami and occupies nearly a complete square block. The plaintiffs do not attack the statutory scheme as it applies to the property occupied by the church building itself. They attack the exemption only as it applies (by virtue of the decision in **Central Baptist Church v. Dade County, supra**) to the 59% of the church property which is used as a commercial parking lot six days of the week. The question we must decide may therefore be framed thusly: Does the holding in **Walz v. Tax Commission, supra**,—that there is no establishment of religion and no inhibition of the free exercise of religion in a state taxation scheme which exempts from taxation property used "exclusively for religious purposes", i.e., "religious properties used soley for religious worship"—encompass the tax exemption in the instant case as it applies to church property used as a commercial parking lot? We answer affirmatively.

The holding in **Walz** is confined to exemptions for religious properties used **exclusively** for religious purposes. Implicit in the Florida Supreme Court's holding in **Central Baptist Church v. Dade County, supra,** is the conclusion that what appears to be a commercial use of church property is really a religious use because all the proceeds from the lot go to church projects and because the parking lot is necessary to the functioning of the church. The parties in this case have stipulated to this effect. In other words, the instant case may be viewed as coming within the strict terms of **Walz** because of the finding of the state court and the stipulations here that the commercial use really amounts to a religious use.

However, it is not necessary to pigeonhole the instant case into the strict terms of the solely-for-religious-worship holding of **Walz**. Read more broadly, **Walz** stands merely for the proposition that a state is free to provide any tax exemption scheme it wishes (as long as the classifications are not capricious or arbitrary) and that exemptions to houses of worship are included because they do not violate the religious clauses of the First Amendment.

Walz makes no attempt to define what kinds of property may or may not be encompassed by an exemption scheme except to say that property used solely for worship can be included. On oral argument in **Walz** plaintiff's counsel stated that he was attacking tax exemptions only as applied to "property used exclusively for religious purposes" and not other property, such as schools or hospitals operated by religious institutions, because it was only the exemption to the **worshipping activity** (and not to other church activities) which he contended created

an establishment of religion. See 38 LW 3189. Viewed in this light, it is clear that the limitation in the Walz opinion to property used exclusively for religious worship was merely a mechanism to put the case in the posture of dealing with the **ultimate** religious activity and the Supreme Court nevertheless held there was no establishment of religion and no inhibition on the free exercise thereof. A **fortiori**, a use of church property for slightly less religious purposes [the parking lot proceeds go to the church's educational and charitable activities as well as to its religious activities] does not create an establishment of religion and does not inhibit the free exercise of religion. Therefore, the exemption in the instant case is constitutional unless the classification—church property used for commercial purposes where the income goes solely to church projects—is arbitrary or capricious.

It is true that **Gibbons v. District of Columbia**, 1886, 116 U.S. 404, was cited in **Walz** as a case denying "tax exemption as to land owned by but not used for the church, but rather to produce income". Page 14 of slip opinion. However, **Gibbons** is not a bar to our reading of **Walz** or to the conclusion we reach. That case stands for no constitutional rule about church property used to produce income; it involved merely the construction of a federal statute which exempted Washington, D.C. church property from taxation but specifically provided that if such property were "used to secure a rent or income" it would be taxed like any other property.

In short, there is nothing in the majority opinion in **Walz** which indicates that a state may not constitutionally construe its religious exemption statute to include church-owned, commercially used property when the proceeds go

solely to church projects.[2] Nor do we think that such an inclusion within the tax exemption scheme is arbitrary or capricious. Accordingly, we hold that F.S. 192.06(4) constitutionally encompasses the 59% of the Central Baptist Church's property utilized six days a week as a commercial parking lot. Plaintiffs' motion for summary judgment is denied, as is the relief sought by plaintiffs, and judgment will be entered for all the defendants.

EATON, J. (concurring specially).

Plaintiffs say that to exempt the Central Baptist Church of Miami, Florida, Inc. from paying real property taxes on approximately 75,000 square feet of land, consisting of 290 parking spaces, operated six days of each week as a commercial parking lot constitutes an establishment of religion, effects a prohibition of the free exercise of religion, and denies the Plaintiffs equal protection of the law.

---

[2]In fact, the concurring opinions of Justices Brennan and Harlan affirmatively assert that religious tax exemptions extend to *all* church property:

> Any assumption that a church building itself is used for exclusively religious activities, however, rests on a simplistic view of ordinary church operations. . . . [T]he funds used to maintain the facilities as a place for religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole. Even during formal worship services, churches frequently collect the funds used to finance their secular operations and make decisions regarding their nature.

Brennan concurring opin. at p. 9.

Justice Harlan's concurrence also supports the conclusion that the exemption necessarily encompasses all church property. He views the tax exemption scheme as applying to religious *organizations* as part of a class of nontaxable *entities* whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement. See p. 3 of his opinion.

Whatever else may be said about this exemption, it cannot be said, in view of Walz v. Tax Commission, 1970, ____ U.S. ____, 25 L.Ed. 2d 697, 90 S.Ct. ____, that the exemption constitutes an establishment of religion or effects a prohibition of the free exercise of religion.

If tax exemption granted on property used solely for religious worship does not constitute an establishment of religion or effect a prohibition of the free exercise thereof, then a tax exemption granted on property used as a profit-making parking lot does not.

To whatever extent each taxpayer in the urban Florida county of Dade is affected by this exemption, the fact is that every taxpayer is affected—including the members of the Church who pay real property taxes on their own Dade County property. The case does not present an "equal protection" proposition.

I must, therefore, concur.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 69-746-Civ-JE

FLORENCE DIFFENDERFER and
NISHAN PAUL,

Plaintiffs,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Defendants.

FINAL JUDGMENT

By Opinion order dated August 21, 1970, this Court ruled that the issues herein are in favor of the defendants and against the plaintiffs, that plaintiffs' motion for summary judgment is denied, and that judgment be entered accordingly in defendants' favor.

NOW THEREFORE, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment be and the same hereby is denied; it is further

ORDERED, ADJUDGED and DECREED that Florida Statute, Section 192.06(4) constitutionally encompasses the 59% of the Central Baptist Church's property utilized six days a week as a commercial parking lot. Final judgment is therefore hereby entered against plaintiffs as to all issues raised by their complaint and in favor of all defendants. The parties shall bear their own costs.

DONE and ORDERED at Miami, Florida, this 5 day of October, 1970.

DAVID W. DYER

Circuit Judge

W. O. MEHRTENS

District Judge

JOE EATON

District Judge

APPENDIX C

SUPREME COURT OF FLORIDA.

No. 37884.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation,

Appellant,

vs.

DADE COUNTY, Florida, a political subdivision of the State of Florida, Porter W. Homer, as County Manager of Metropolitan Dade County, R. K. Overstreet, as Tax Collector of Metropolitan Dade County, and Fred O. Dickinson, Jr., as Comptroller of the State of Florida,

Appellees.

Nov. 27, 1968.

Action by church to enjoin collection of real estate taxes. The Circuit Court, Dade County, William A. Herin, J., denied relief and church appealed. The Supreme Court, Ervin, J., held that limited part-time rental of portion of church lot for commercial parking during weekday business hours was reasonably incidental to primary use of church property as whole for church or religious purposes and was not sufficiently divergent commercial use that eliminated tax exemption as to commercial parking lot portion of property.

Reversed with directions.

Caldwell, C. J., and Thomas, J., dissented.

1. Taxation Key 193

Statutory grant of tax exemption to church property complies with constitutional requirments relating thereto. F.S.A. Const. art. 16, § 16; F.S.A. § 192.06.

2. Taxation Key 244

Statute relating to exemption of church property from taxation grants ad valorem tax exemption to church property when it is used for church or religious purposes. F.S.A. § 192.06(4).

3. Taxation Key 244

Limited part-time rental of portion of church lot for commercial parking on weekday business hours was reasonably incidental to primary use of church property as whole for church or religious purposes and was not sufficiently divergent commercial use that eliminated tax exemption as to commercial parking lot portion of property. F.S.A. § 192.06(4).

4. Taxation Key 204(2)

Court would not interpret language into statute granting church property exemption from taxation since any material change in exemption statute, if advisable, should be made by Legislature. F.S.A. § 192.06(4).

Herbert S. Sawyer of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for appellant.

Thomas C. Britton, County Atty., and Stuart Simon, Asst. County Atty., for appellees.

ERVIN, Justice.

This appeal was transferred here by the District Court of Appeal, Third District, since it appeared to that court the final decree of the Circuit Court of Dade County, Florida construed. Section 16, Article XVI of the State Constitution, F.S.A. Our inspection of the decree confirms the transfer of the appeal was in order and we accept jurisdiction of it.

Appellant, Central Baptist Church of Miami, Florida, Inc., is a nonprofit Florida corporation which owns virtually an entire city block in downtown Miami on which its church building is located. A large part of the ownership not used for the church building is utilized as a parking area, a small portion being reserved at all times for the parking of the cars of the pastor and other members of the church staff. During weekday business hours the parking area, except for the small portion reserved at all times for the church staff, is rented out and used as a commercial parking lot, the net income from which is devoted in its entirety by the church to its world missions and education program. On Sundays and evenings the parking area serves as a free parking facility for congregants during hours of church services and church related activities.

Percentagewise, 41% of the church property is occupied by church buildings and 59% is maintained for parking area.

In respect to the practical problems and necessities involved, the Appellant church corporation made an evidentiary showing that as its congregation grew it was necessary over the past several years for it to acquire with church funds additional lots in the block where its church building is situated for its congregants' car parking. Since the large parking area it acquired is idle of congregant parking during weekday business hours, Appellant deemed it reasonable to share its parking area and accommodate public parking in downtown Miami where traffic is congested and parking space is limited. In this way its parking area serves a dual church and public purpose and Appellant is enabled from the income derived from public parking to augment its funds allocated to world missions and religious education. In this respect the trial judge found and set forth in his decree:

> "* * * A large and beautiful Church known as the Central Baptist Church of Miami stands on the property. On the aforesaid city block and adjacent to the Church Building is a substantial parking area * * *. The major portion of the parking area is used on Sundays and in the evenings as a gratuitous parking facility by congregants during the hours that Church services and other Church activities are taking place upon the Church property. In this era of motor travel it is conceded that ample parking facilities are essential to meet the needs of a modern downtown Church, and the Court recognizes that

> the plaintiff [Appellant] has frequently had to rent many additional nearby parking spaces to accommodate its worshipers. During weekday business hours however the parking area, save for the small portion reserved at all times for Church officials, is used as a commercial parking lot."

County taxing officials deem the property exempt from ad valorem taxation except for the portion used as a commercial parking lot on weekdays. The entire parking area was first assessed for ad valorem taxes in 1965 and the taxes were paid under protest. In 1966 an assessment was imposed on the parking area of $150,000 and the tax levied on this assessment came to $3,416.25.

Appellant's application for exempt status for its parking lot was denied by the Tax Assessor of Dade County; and the Board of County Commissioners of Dade County, sitting as a Board of Equalization, sustained the Tax Assessor's denial of exempt status.

Appellant initiated proceedings in the Circuit Court to enjoin collection of the assessed taxes. The trial court entered summary judgment in favor of the County as to that portion of the parking area used for commercial parking during weekday business hours.

We reverse the final decree.

F.S. Section 192.06, F.S.A. appears to be applicable to the question presented by the appeal. It reads in part as follows:

"192.06 **Property exempt from taxation.** — The following property shall be exempt from taxation:

* * *

"(4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs, and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property."

[1] This section in granting tax exemption to church property complies with the requirements of Section 16, Article XVI, State Constitution, as construed in Jasper v. Mease Manor, Inc. (Fla.), 208 So.2d 821.

Finding there is a general statutory exemption of property used for church or religious purposes consistent with said constitutional provision, we turn to an interpretation of such statutory exemption as it applies to the situation in this case.

[2, 3] We find the statute grants ad valorem tax exemption to Appellant's property when it is used for church or religious purposes. We further find the limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a

sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property.

Our reasons for this interpretation are as follows: In the first place, the concluding proviso of paragraph (4) of Section 192.06, literally read, lifts the exemption granted church property only from the building that is the house of worship when it is rented. It does not purport in terms to remove the exemption from rented church land adjacent the house of worship building. But less technically and more practically, it does not appear that the Legislature intended by the language of Section 192.06 (4) to remove the church property tax exemption where the rental of a portion of a church lot is limited in nature and does not result in the portion rented being placed beyond its regular and customary church use, and the rental funds derived are used for purposes contemplated by Section 16, Article XVI, State Constitution. The legislative wisdom and policy of the statute are that if certain church related property (parsonages and burying grounds) is held by private persons for speculative purposes or if the house of worship itself is rented for a nonworship or nonschool purpose, these are diversions from church use sufficient in degree to warrant lifting the tax exemption. However, lesser and more limited divergent uses of church property are apparently not deemed by the Legislature sufficiently inconsistent with church purposes to lift the exemption, provided the funds derived from such uses are not diverted to purposes not contemplated by Section 16, Article XVI.

Until 1965 no attempt had been made by the county taxing authorities to impose ad valorem taxes on the

portion of Appellant's property rented for commercial parking purposes. Furthermore, we find no amendments to F.S. Section 192.06, F.S.A., including Chapter 65-438 (relating to exemptions for homes for the aged), which modify the prior administrative construction of the county taxing authorities that the portion of Appellant's church lot rented for commercial parking was exempt from taxation. The record conclusively reflects the church devotes the net income received by it from rentals of the commercial parking lot area to religious and educational purposes. If similar income were so devoted by any of the institutions referred to in F.S. Section 192.06(3), F.S.A., the property (if owned or held by any of such institutions) from which it was derived would be tax exempt. Such institutions under Section 192.06(3) may rent, from the property actually occupied and used by them for the purposes for which they are organized,

> "* * * not more than seventy-five (75%) per cent of the floor space of said building or property * * * and the rents, issues, and profits of said property are used for the educational, literary, benevolent, fraternal, charitable or scientific purposes of said institutions * * *"

Since there is nothing in Section 192.06(4) which purports to remove the tax exemption from church lot property under limited, part-time rental, and the rental use is not inconsistent with the normal church use of such lot property, we see no objection to an administrative tax ruling that the exemption remains so long as the funds derived from the rental are devoted to the purposes contemplated by Section 16 of Article XVI.

We reiterate that our opinion is restricted to an interpretation of F.S. Section 192.06(4), F.S.A., as it applies to the particular facts of this case. Tax exemption of church property generally is granted thereby; once granted by the Legislature, its application then becomes a matter subject to interpretation.

[4] Section 192.06(4) does not contain apt language removing the general exemption covering church lots or grounds used as such when they are rented part time. Only through judicial interpretation by way of analogy could we treat part-time rental of church lots the equivalent of rental of houses of worship and remove the exemption. But the statue does not go that far. On the other hand, in considering the matter we are confronted by the treatment accorded properties of those institutions coming under Section 192.06(3) when they are rented, and the claim that Appellant is not deprived of analogous treatment by Section 192.06(4). Under these conditions we think it wisdom on our part not to interpolate language into Section 192.06(4) that would lift the exemption claimed by Appellant in this case, since any material change in the exemption statute, if advisable, lies more appropriately in the legislative province. Moreover, it is difficult because of equitable principles to accord different exemption treatment to churches than is accorded the other institutions under Section 16, Article XVI, and especially so where tax exemption is granted church property by statute and the exemption granted therein is not expressly removed by the statute in all instances where church properties are rented.

The decree of the Circuit Court is reversed with direction that a decree consistent with this opinion and judgment be entered in lieu thereof.

It is so ordered.

ROBERTS DREW, THORNAL and HOPPING, JJ., concur.

CALDWELL, C. J., and THOMAS, J., dissent.

APPENDIX D

(3) Such property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purpose for which they have been or may be organized; provided, not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or charitable purposes of said institutions; provided, further, that nothing in this subsection shall be construed as applying to special assessment by municipalities for sidewalks, curbing, street paving or other local improvements.

(4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property.

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 69-746-Civ-JE

FLORENCE DIFFENDERFER and NISHAN PAUL,
Plaintiffs,

v.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation, DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Defendants.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that FLORENCE DIFFENDERFER and NISHAN PAUL, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Final Judgment entered for the defendants on October 5, 1970.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record in this cause.

III. The following questions are presented by this appeal:

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, DADE COUNTY, FLORIDA, to the defendant, CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the United States Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

HOWARD J. HOLLANDER
BERNARD C. PESTCOE and
RICHARD FEDER
Attorneys for Plaintiffs
c/o AMERICAN CIVIL
LIBERTIES UNION
708 City National Bank Building
Miami, Florida, 33130

BY: _____

PROOF OF SERVICE

I, RICHARD FEDER, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1970, I served copies of the foregoing Amended Notice of Appeal to the Supreme Court of the United States on the several parties thereto as follows: MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, 1600 First National Bank Building, Miami, Florida: THOMAS C. BRITTON, ESQ., Attention St. Julien P. Rosemond, Esq., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130.

_____

Attorney

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 4 1971
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

On Appeal from the United States District Court for the Southern District of Florida

MOTION TO DISMISS OR AFFIRM

Herbert S. Sawyer
of
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Attorneys for Appellee, Central Baptist Church of Miami, Florida, Incorporated

INDEX

	Page
Cases Cited	4
Proof of Service	10

APPELLEE'S

Appendix A	App. 1
Appendix B	App. 3
Appendix C	App. 15

APPELLANT'S

Appendix A	App. 7
Appendix B	App. 7
Appendix C	App. 8

TABLE OF CITATIONS

	Page
Abington School District v. Schempp, 374 U.S. 203 (1963)	6
Central Baptist Church of Miami Florida, Incorporated v. Dade County, Florida, et al., 216 So.2d 4 (1968)	3
John Dicenso, et al. v. William B. Robinson, Jr., et al. Opinion, June 15, 1970	7
Engel v. Vitale, 370 U.S. 421 (1962), 8 L.Ed.2d 601	6
Everson v. Board of Education, 330 U.S. 1 (1946), 91 L.Ed. 711	5
Gibbons v. District of Columbia, 116 U.S. 404, 29 L.Ed. 680 (1886)	4
McCollum v. Board of Education, 333 U.S. 203 (1948), 92 L.Ed. 649	5
Murray v. Curlett, 374 U.S. 203 (1963)	6
Walz v. Tax Commission of the City of New York 90 S.Ct. 1409 (1970), 25 L.Ed.2d 697	4

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1,042

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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MOTION TO DISMISS OR AFFIRM

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation, pursuant to Rule 16, Supreme Court Rules, moves the Court to dismiss or affirm this appeal, a direct appeal from a Three-Judge District Court convened in the Southern District of Florida. 28 U.S.C., Section 1253. Plaintiff-Appellants attack the constitutionality of F.S. 192.06(3) and (4).

Attached as Appendix A and by reference made a part of this motion is a copy of F.S. 192.06(3) and (4); also, a copy of a Stipulation of Facts entered into by all of the parties as Appendix B. The Stipulation is, of course, before the Court in the record sent up from the Clerk below, but, as we understand the procedure, the papers of this record will not be distributed to the members of the Court until after it is printed.

The question as submitted might raise the issues if the property involved here were five blocks removed from the Church and consisted of an office building, no part of which was occupied by the Church, and all of the net revenue received were used for the purchase of another such building — but this case is not predicated upon such facts.

Upon the Stipulation of Facts (App. B), we submit that the following question drawn entirely from the facts of the cause represents the issue decided by the Three-Judge Court:

> When a parking area adjoins, is contiguous with and constitutes a functional, physical, essential and necessary part of the overall functions of

the Church, which is located in the center of a great metropolitan area, many of the parking spaces being used by the congregants of the Church every day seven days a week but, when some of the parking spaces are not so used during the business hours of six days a week, they are rented to the public and all of the proceeds derived from such rentals are used by the Church exclusively for its religious, educational, literary, benevolent, fraternal and charitable work and where it is stipulated by the parties that the Church could not operate without this parking area; and that it is in fact as necessary for such operation as is the roof over the Church building itself — did the Three-Judge Court err in holding that the property is tax exempt?

Appellants' Jurisdictional Statement includes Appendices A (copy of the Three-Judge Opinion), B (copy of the Three-Judge Final Judgment) and C (copy of the Opinion of the Supreme Court of Florida in **Central Baptist Church of Miami, Florida, Incorporated v. Dade County, Florida, et al.**, 216 So.2d 4 (1968). These Appendices, A, B and C are by reference made a part of this Motion. The same property was involved in the Three-Judge Opinion and in the Opinion of the Supreme Court of Florida.

Our Stipulation (Appendix B) shows that those portions of the parking area not used by the Church "during the week day business hours" are rented to the public for a reasonable fee, and all of the monies received from such rentals are used by the Church exclusively for its religious, missionary, educational, literary, benevolent,

fraternal and charitable activities and programs of the Church. The Stipulation covers only "during the week day business hours". There is nothing in the Stipulation or Three-Judge Opinion to indicate that any of the parking spaces (of which there are 290) are rented during the evening or night hours, as alleged by appellants. In fact the Supreme Court of Florida, in **Central Baptist Church,** found that these lots were used on Sundays and evenings as a free parking facility for congregants during hours of Church services and Church activities.

Rule 15(1) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Rule 16 enumerates grounds for motions to dismiss appeals from state and federal courts, one is "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Appellants' Jurisdictional Statement does not comply with either of these rules.

CASES CITED

Appellants cited seven opinions of this Court, only two of which touch the issues involved here. They are: **Walz v. Tax Commission of the City of New York,** 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970), and **Gibbons v. District of Columbia,** 116 U.S. 404, 29 L.Ed. 680 (1886).

In **Walz** the property involved was the church building. In our case the property, as stipulated, "adjoins, is contiguous to and is a functional and physical part of the

Church itself".[1] And " . . . this Church could not operate in this location without these parking spaces. . . . They are just as necessary for the operation of the Church as the roof over the Church building itself."[2]

Gibbons, cited and quoted in **Walz**, is certainly no help for appellants. First, the lots involved were "separated from the lots in question by a 30-foot passage. . ." Second, the reasons for placing the church building in the center of the property "was to enable a revenue to be derived from the **sale** or **lease** of these lots to pay off the church debt incurred in building." And finally, "it **was not necessary** for the enjoyment of the church that these lots should remain vacant." (Emphasis added.) Each of these facts is directly in reverse of the facts of our case.

All of the other cases cited were also considered in **Walz**, but none of them involved exempting church property from taxation nor a claim that such exemption constituted establishment of religion or inhibition of the free exercise of religion in a tax exemption scheme which exempts from taxation property used "exclusively for religious purposes".

In **Everson v. Board of Education**, 330 U.S. 1 (1946), 91 L.Ed. 711, the Board of Education was reimbursing parents for money which they paid for bus fare in transporting their children to and from a parochial school. This Court held that to be legal.

McCollum v. Board of Education, 333 U.S. 203 (1948), 92 L.Ed. 649, is a case where school students were per-

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[1]Appellee's Appendix B, Page App. 5

[2]Appellee's Appendix B, Page App. 12 – 11.

mitted to attend religious instruction in the school building conducted by outside teachers. It was held illegal.

Abington School District v. Schempp, 374 U.S. 203 (1963) and **Murray v. Curlett** (same citation), are two cases heard together (one from Pennsylvania and one from Maryland) with one opinion. They involved "requiring the reading, without comment, at the opening of each school day, a verse from the Bible and the recitation of the Lord's prayer by the students in unison." This was held to be unconstitutional.

The last case is **Engel v. Vitale**, 370 U.S. 421 (1962), 8 L.Ed. 2d 601. Here, the State of New York adopted a program of daily classroom prayers in public schools. This Court ruled it was establishment of religion.

In **Everson**, the Court did announce a very cogent principle that might save appellee's position here, should the Court have the slightest doubt of the soundness thereof, you said:

> "The Supreme Court of the United States may not strike down a state statute which is within the state's constitutional power even though it approaches the verge of that power."

The Florida Supreme Court, in **Central Baptist Church of Miami, Florida, Incorporated v. Dade County, et al.**, held that Section (4) of F.S. 192.06, "complies with the requirements of Section 16, Article XVI (Florida) state constitution."

It is apparent that appellants receive no help from any of the cases cited by them. In other words, they came

before this Court without one authority, federal or state, supporting them. The reason is clear. There are none. The only cases in this Court touching tax exemption on church property are **Gibbons** and **Walz.**

The facts in **Gibbons** and the instant case are so divergent that it gives the appellants no assistance; whereas, **Walz** supports the position of the appellees.

The Three-Judge Court crystallizes the matter.[3]

> "The question we must decide may therefore be framed thusly: Does the holding in **Walz v. Tax Commission, supra,**—that there is no establishment of religion and no inhibition of the free exercise of religion in a state taxation scheme which exempts from taxation property used 'exclusively for religious purposes', i.e., 'religious properties used solely for religious worship'—encompass the tax exemption in the instant case as it applies to church property used as a commercial parking lot? We answer affirmatively."

At least one other Three-Judge Court opinion has made reference to **Walz. John Dicenso, et al. v. William P. Robinson, Jr., et al.,** District Court of the United States for the District of Rhode Island (Opinion June 15, 1970). That suit involved a statute of Rhode Island providing for supplementary income for teachers. It was shown that the real beneficiaries were Catholic school teachers and the Act was declared unconstitutional as an establishment of religion under the First Amendment. It is not a tax exemption case but the Court discussed the theory of "excessive entanglement" between government and religious institutions as developed by **Walz.**

---

[3]Appellants Appendix A 4.

We submit that there is no such entanglement involved here. There is no sponsorship, interference, or a relationship generating confrontation and conflicts. The mere granting of a tax exemption does not constitute subsidizing the Church. And the Church certainly is not a "private profit institution".

Appellants are asking this Court to declare subsections (3) and (4) of F.S. 192.06 unconstitutional. You will note by our Appendix A that Subsection (3) provides for exempting "property of educational, literary, benevolent, fraternal, charitable and scientific institutions" when occupied and used by them for the purposes for which they have been or may be organized "provided not more than 75 per cent of the floor space of the said building or property is rented, and the rents, issues and profits of said property are used for the "educational, literary, benevolent, fraternal, charitable or scientific purposes of said institution". (Emphasis added.)

In our case the parking area constitutes only 59 percent of the Church property — the other 41 per cent being occupied by the Church buildings.[4]

In considering this Section, the Supreme Court of Florida, in **Central Baptist Church**, said:

> "... it is difficult because of equitable principles to accord different exemption treatment to churches than is accorded the other institutions under Section 16, Article XVI, and especially so where tax exemption is granted Church property by Statute and the exemption granted

[4]Appellants App. C, Page 14.

therein is not expressly removed by the statute in all instances where church properties are rented." (Appellants' App. 19)

A copy of Section 16, Article XVI, Florida Constitution, is attached as Appellee's Appendix C.

The Florida court also said:

"We further find the limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property." (Appellants' App. 16)

Concluding, we respectfully submit that, as the Three-Judge Opinion holds, **Walz** encompasses this case. The parking lots are as necessary for the operation of the Church as the Church building itself and the incidental rental of those parking spaces not utilized by the Church during the business hours 6 days a week does not affect their tax exempt status.

Respectfully submitted,

Herbert S. Sawyer
of

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COLE
1600 First National Bank Building
Miami, Florida 33131
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Central Baptist Church of
Miami, Florida, Incorporated

PROOF OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Motion to Dismiss or Affirm were served by mail this 30th day of December, 1970, to: HOWARD J. HOLLANDER, ESQ., BERNARD C. PESTCOE, ESQ. and RICHARD FEDER, ESQ., Attorneys for Appellants, c/o American Civil Liberties Union, 708 City National Bank Building, Miami, Florida 33130; and THOMAS C. BRITTON, ESQ., Attention ST. JULIEN P. ROSEMOND, ESQ., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, by depositing the same in a United States post office, or mail box, with first-class postage prepaid addressed to counsel of record at his post office address.

Of Counsel

APPENDIX

APPENDIX

APPENDIX A

F.S. 192.06(3) and (4)

192.06 Property exempt from taxation.—The following property shall be exempt from taxation:

*(3) Such property of educational, literary, benevolent, fraternal, charitable and scientific institutions within this state, as shall actually be occupied and used by them for the purpose for which they have been or may be organized, provided, not more than seventy-five per cent of the floor space of said building or property is rented, and the rents, issues, and profits of said property are used for the educational, literary, benevolent, fraternal, charitable or scientific purposes of said institutions; provided, further, that the above stated limitation against the rental of more than seventy-five per cent of the floor space of any such building or property shall not apply to apartments, rooms or beds rented, or available for rent, to patients in any hospital or to residents in any home for the aged, if such hospital or home for the aged is licensed by the state board of health, operated by a Florida corporation, not for profit, which has been exempt from the payment of taxes to the United States upon the income derived from the operation of such hospital or home for the aged, if all of such income, remaining after payment of the usual and necessary expenses of operating such hospital or home for the aged, including the payment of liens and encumbrances

upon the property of such corporation, shall be used exclusively for educational, charitable or scientific purposes, including the maintenance improvement or expansion of the facilities of such hospital or home for the aged; provided further, that nothing in this subsection shall be construed as applying to special assessment by municipalities for sidewalks, curbing, street paving or other local improvements. Provided further, that educational institutions as used in this chapter shall mean state tax supported, parochial, church and nonprofit private schools, colleges or universities conducting regular classes and courses of study required for eligibility to, certification by, accreditation to or membership in the southern association of colleges and secondary schools, state department of education or the Florida council of independent schools. This section shall not apply to property owned by testamentary charitable trusts in counties having a population of not less than one hundred twelve thousand nor more than one hundred seventy thousand according to the latest official decennial census.

(4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA

MIAMI DIVISION

NO. 69-746 Civ-JE

FLORENCE DIFFENDERFER and NISHAN PAUL,
Plaintiffs,

v.

CENTRAL BAPTIST CHURCH OF
MIAMI FLORIDA, INCORPORATED, et al.,
Defendants.

STIPULATION OF FACTS

It is stipulated and agreed by counsel for the respective parties herein that:

1. The defendant, CENTRAL BAPTIST CHURCH, is a non-profit Florida corporation. It owns all of the block of land situated in Miami between Miami Avenue and N. E. First Avenue and N. E. Fifth Street and N. E. Sixth Street, except Lots 4 and 5 and the S. 75 feet of Lots 10 and 11, as more particularly appears by plat of said property, copy of which is hereto attached and by reference made a part hereof. All of this property is being used by the Church in the conduct of and for the purpose of furthering its religious, educational, literary, benevolent, fraternal, and/or charitable activities. More

particularly, the property is the situs of the following structures and improvements, which are and have been put to the following uses:

a. The Church Sanctuary and the Sunday School Educational Building upon Lots 18, 19 and 20, and South 100 feet of Lots 1, 2 and 3, in which the Church's congregation and others gather periodically to worship according to their religious faith, to study and practice the teachings of God, and to organize and administer its religious, educational, literary, benevolent, fraternal and/or charitable activities and programs.

b. The Mission building upon the North 50 feet of Lots 9 and 10, which the Church maintains as an informal come-as-you-are House of Worship where services are regularly conducted for the less fortunate and destitute persons living in the immediate area. The Mission is also frequently used for various other purposes.

c. The minister's and church personnel's parking facility on the surface of the North 50 feet of Lot 1 and the East 25 feet of the North 50 feet of Lot 2, is maintained for use by various salaried personnel of the Church for parking their automobiles while they attend the duties to which they have been assigned.

d. The Church parking facilities on the surface of the remainder of the property, consisting of 290 parking spaces on which a portion of the Church's congregation park their automobiles while participating in the furtherance of its religious, educational, literary, benevolent, fraternal, and/or charitable activities and programs. This property is hereafter referred to as "PARKING AREA".

The Church is located in the heart of a great metropolitan area, and is required to maintain the PARKING AREA for the use of its congregation due to the inadequacy of on-street and off-street parking facilities in the vicinity. When the PARKING AREA is not so used, this being during the week-day business hours, parking facilities in the vicinity are greatly needed by the general public. Part of this parking space is used every day of the week by people attending Church and Church functions and meetings, but rather than permit that portion not so used to lie vacant when unusued by church people, the Church rents the PARKING AREA to the public charging reasonable rental fees therefor. Every cost and expense incurred by the Church in connection with the PARKING AREA is paid from the general funds of the Church, and the gross income derived from the public rental of the PARKING AREA is specifically designated and used for the Church's religious, educational, literary, benevolent, fraternal and/or charitable purposes and activities.

2. The PARKING AREA consists of approximately 75,000 square feet, all of which area adjoins, is contiguous to and is a functional and physical part of the Church itself and consists of a total area of approximately 127,500 square feet of real property owned by the Church at 500 N. E. First Avenue, Miami, Florida, and shown on the plat attached.

The monies collected by the Church in connection with the partial public rental of the PARKING AREA are used exclusively for the religious, educational, literary, benevolent, fraternal, and/or charitable activities and programs of the Church. Said activities and programs

are designated in the Church's budget as the World Missions and Education Program.

3. Every dollar of income realized by the Church as the proceeds of charges made by the Church for the use of any of its off-street parking spaces is appropriated by the budget of the Church, and is used by the Church each month, exclusively for the Church's World Missions and Educational Program. None of this income is used for any other purpose, directly or indirectly. None of the expenses of operating the Church's off-street parking area are paid by or from any portion of any charges made by the Church for the use of any of its off-street parking spaces.

The Church's World Missions and Educational Program is exclusively a religious, educational, literary, benevolent, fraternal and charitable program. The moneys appropriated and disbursed for the program, including but not limited to the entire proceeds of all charges made by the Church for the use of any of its off-street parking spaces, are disbursed to or for the benefit of the following persons, organizations and institutions or in the furtherance of the following purposes and beneficences:

a. Cooperative Program of Southern Baptist Convention

b. Miami Baptist Association

c. American Bible Society

d. Baptist Bible Institute

e. Fay Taylor Salary (Missionary)

f. Betty Mills Salary (Missionary)

g. Religious Broadcasting

h. Local Missions

i. Protestants and Other Americans United

j. Christian Coffee House

k. Metropolitan Fellowship of Churches

l. Crusade of Americas

m. Ministerial Retirement

n. Spanish Mission

The auditorium of the Church has a seating capacity of approximately 2200. If the congregation should attempt, at this time to build the Church Sanctuary on any other property in the City of Miami, except within the C-3 (Central Commercial) District, Ordinance No. 6871 of the City would require the congregation to provide for such new Church one off-street parking space for each five seats in the auditorium, or a total of approximately 440 off-street parking spaces. The requirement in the unincorporated area of the county is one parking space for each four seats in a church auditorium, Code of Metropolitan Dade County, Section 33-124(d). This would mean, were the Church in an unincorporated portion of the county, it would be required to have 550 off-street parking spaces.

The area of the off-street parking spaces for which the Church makes charges on week days is less than 75% of the total of the real property owned by the Church in the city block, and is an integral and functional and physical part thereof, and is an indispensable and essential Church property used by the Church solely and exclusively

in furtherance of the religious, educational, literary, benevolent, fraternal and charitable purposes and objects of the Church set out in its original Charter and in its Amended Certificate of Incorporation, a copy of which is attached.

4. The Church's PARKING AREA cannot accommodate the Sunday Congregations and the Church, of necessity, has rented other parking spaces for that day and has arranged with a number of businesses in the general vicinity for free use of their parking areas on Sunday. They are used without charge of any kind by those:

(i) Members and others attending Sunday School on Sundays.

(ii) Members and others attending the morning worship service on Sundays.

(iii) Members and others using the Church Library on Sundays.

(iv) Members and others attending practice of the Bell Choir in the afternoon of many Sundays.

(v) Members and others attending practice of the Concord Choir in the afternoon of many Sundays.

(vi) Members and others attending practice of the Chapel Choir in the afternoon of many Sundays.

(vii) Members and others attending the Training Union Fellowship in the late afternoon of Sundays.

(viii) Members and others attending the Training Union in the early evening of Sundays.

(ix) Members and others attending the Evening Worship Service on Sundays.

(x) Members of the Executive Board of the Miami Baptist Association, which has more than 200 members, attending on at least 12 Mondays in every year meetings which begin in the morning and continue through lunch and into the afternoon.

(xi) Members and others attending in the late afternoon of at least 12 Mondays in every year meetings of the Church's Men's Brotherhood.

(xii) Deacons in the Church meeting in the evening of at least 12 Mondays in every year.

(xiii) Members and others attending practices of the Children's Choirs in the afternoon of many Wednesdays in the year.

(xiv) Members and others using the Church library in the afternoon of every Wednesday in the year.

(xv) Members and others attending practice of the Bell Choir in the afternoon of many Wednesdays in the year.

(xvi) Members and others attending the Family Supper in the late afternoon of every Wednesday in the year.

(xvii) Members and others attending Officers and Teachers meetings, Departmental meetings and numerous other meetings in the early evening of every Wednesday in the year.

(xviii) Members of and the clerical assistant to the Finance Committee of the Church in attendance

at meetings in the evening of every Wednesday in the year.

(xix) Members and others attending Prayer Meeting in the evening of every Wednesday in the year..

(xx) Members and others attending practice of the Sanctuary Choir, having over 100 members, in the evening of substantially every Thursday in the year.

(xxi) Members and others attending meetings of the Women's Missionary Society in the morning of at least 12 Fridays in the year.

(xxii) Those in attendance on weekdays at monthly daytime meetings of the Ministers' Conference of the Miami Baptist Association.

(xxiii) Those in attendance on weekdays at daytime meetings of members of the Parent Teachers Association.

(xxiv) Those in attendance at any wedding held at the Church.

(xxv) Those in attendance at any funeral service conducted at the Church.

(xxvi) Numerous other morning, afternoon and evening weekday Church, denominational, religious, educational, literary, benevolent, fraternal and charitable gatherings, meetings, activities and programs.

The Church never has made, and does not make, any charge of any kind for any of its off-street parking spaces used at any time for any purpose stated in any of the

foregoing paragraphs numbered (i) to (xxvi), inclusive, and has made, and now makes, charges only on weekdays (Monday through Saturday) for such of its off-street parking spaces as are not in use for any of those purposes.

The Supreme Court of Florida said:

> "We further find the limited part time rental of a portion of the church lot for commercial parking on weekday business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and is not a sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property."

A portion of the Lots were not assessed by Dade County. The North 50 feet of Lot 1 and the East 25 feet of the North 50 feet of Lot 2 are used seven days a week by the Church employees or personnel, the pastor and others, and Dade County admitted that these lots should not be assessed.

5. As admitted in the Supreme Court of Florida, this Church could not operate in this location without these parking spaces. They are just as necessary for the operation of the Church as the roof over the Church Building. In the argument, the following conversation took place:

Q. (Justice Drew, from the bench, asked the attorney for the County), "Mr. Simon, could this Church operate in its present locality without these parking spaces?"

A. "No, Your Honor, it could not."

Q. "Mr. Simon, aren't these parking spaces just as necessary for the operation of this Church as the roof over the building itself?"
A. "Yes, Your Honor, they are."

Dated this 20th day of November, 1969.

HOLLANDER and PESTCOE
708 City National Bank Building
Miami, Florida 33130
Attorneys for Plaintiffs

By /s/ Hal J. Hollander

and

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE
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By /s/ Herbert S. Sawyer

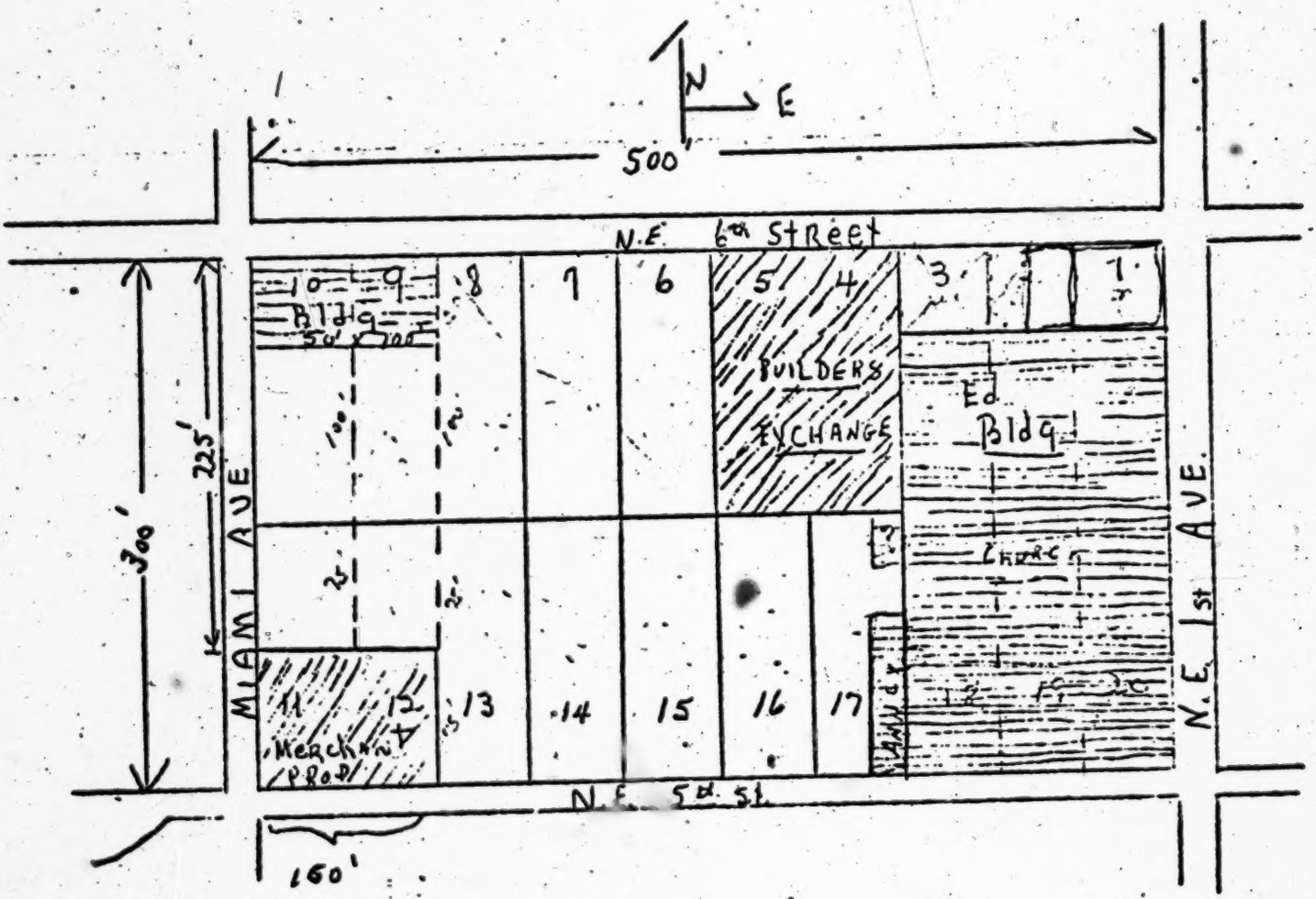
and

THOMAS C. BRITTON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

By /s/ St. Julien P. Rosemond

Block 63N-PB B-41 - N.E 5th to N.E. 6th St. from Miami Ave. to S.E. 1st.Ave.

Block----------	150,000 sq. ft. less easement
Builders Exchange	15,000 sq. ft. Lots- 4 & 5
Merchant's	7,500 sq. ft. So. 75' of lots 11 &12
Church Owned	127,500 sq. ft. Balance owned by church.



All lots 50' wide by 150' deep less 10' Easement.

Shaded area does not belong to church.

Shaded church owned buildings.

White area - Parking area.

The purposes and objects of the Church are set forth in Article II of the Amended Certificate of Incorporation as follows:

> "The general purpose and objects of this corporation shall be to conduct for religious worship and instruction, churches, schools, parsonages, and other institutions connected therewith of a religious, educational, charitable and benevolent character to the end that its own members and others may be generally instructed and guided concerning those New Testament doctrines which are most surely held among Southern Missionary Baptist Churches and to advance spiritual growth and enlightenment, moral and personal purity among its own membership and the people of the community in which it is located; to promote home and foreign missions; and to aid in the spread of the Gospel of Jesus Christ to the ends of the earth; also to educate, prepare and ordain Christian men and women for the ministry of the Gospel of Jesus Christ; and for the purpose of promoting the foregoing objects, this corporation shall have the right to acquire, either by gift or purchase, and to hold, own, sell, mortgage, or encumber in any manner, lease and improve real estate and personal property for itself and others, either as trustees or otherwise."

APPENDIX C

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE XVI

SECTION 16. **Corporate property subject to taxation, exception.**—The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the Legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.

SUPREME COURT, U. S. MOTION FILED
APR 15 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-47

No. [redacted]

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

v.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

Of Counsel:

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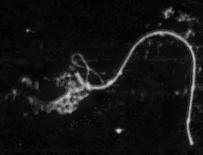

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
STATUTE INVOLVED	5
QUESTION PRESENTED	5
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. Schempp, 374 U.S. 203 (1963)	9
All Saints Parish v. The Inhabitants of Town of Brookline, 178 Mass. 44, 59 N.E. 1003 (1901)	10
Davis v. Beason, 133 U.S. 333 (1890)	19
Engel v. Vitale, 370 U.S. 421 (1962)	9
Everson v. Bd. of Education, 330 U.S. 1 (1947)	9
General Finance Corp. v. Archetto, 93 R.I. 392, 176 A.2d 73, app. dism. 369 U.S. 423 (1962)	10
Gibbons v. District of Columbia, 116 U.S. 404 (1886)	6, 13
Reynolds v. United States, 98 U.S. 145 (1878)	19
Torcaso v. Watkins, 367 U.S. 488	9
United States v. Ballard, 322 U.S. 72 (1944)	18
Walz v. Tax Commission, 397 U.S. 644 (1970)	*passim*
Zorach v. Clauson, 343 U.S. 306	9

Texts:

Church State and Freedom, Leo Pfeffer	10
The Churches, Their Riches, Revenues and Immunities, Martin A. Larson and C. Stanley Lowell	20
A Dictionary of the English Language–Samuel Johnson (1755)	18

Page

Exemption of Property from Taxation in the United States Claude W. Stimson, 18 Minn. L.R. 411 (1933-4) 12

The Folklore of Philanthropy, John Barzum 1959 11

A Letter Concerning Toleration, Locke, John 19

Should Churches Be Taxed? – D.B. Robertson (1968) 11

Speaking of Politics, F.C. Salisbury (1956) 14, 18

Tax Exemption of Church Property–Arvo Van Alstyne 20 Ohio St., L.J. 461 (1959) 12, 17

CONSTITUTION

U.S. Constitution First Amendment 5, 7, 9, 13, 19, 20

U.S. Constitution Fifth Amendment 16

U.S. Constitution Fourteenth Amendment 5, 7

STATUTE

Florida Statutes (F.S. 192.06(3) and (4) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1042

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

v.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Protestants and Other Americans United hereby respectfully moves leave to file the accompanying brief *amicus curiae* in this case in support of appellant as provided in Rule 42 of the rules of this Court. Permission to file this brief has been requested of both parties and granted by appellants.

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational organization organized under the laws of the District of Columbia.

Protestants and Other Americans United is interested in the Separation of Church and State. The function of this

amicus curiae is to present additional legal authorities for consideration by this Court in this important litigation.

The attached brief is submitted in the hope that it will assist the Court in its deliberations. For the foregoing reasons, the *amicus curiae* respectfully requests that this motion be granted.

Respectfully submitted,

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Attorney for the Amicus

NOEL H. THOMPSON
Of Counsel

IN THE

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OCTOBER TERM, 1970

No. 1042

FLORENCE DIFFENDERFER and NISHAN PAUL,

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Appellees.

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF AMICUS

Protestants and Other Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington, D.C. area, with some 100,000 members in all the states of the United States. Its sole chartered purpose is to preserve the principle of separation of church and state as set forth in the First Amendment to the Constitution of the United States

and in the constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Protestants and Other Americans United for Separation of Church and State, popularly known as "Americans United" has members and "Scroll" (supporting) churches in the State of Florida and is especially concerned over new developments in the state which raise questions of possible infringement of the religious clauses of the First Amendment and the Constitution of the United States. The Central Baptist Church of Miami, Florida, an appellee in this case, is a supporting member of Americans United being a "Scroll Church" which indicates that it is a church dedicated to the principle of separation of church and state.

Americans United admires and supports the great work of the Central Baptist Church, but it reluctantly must argue for a position contrary to that taken, quite sincerely, by its own member church. Americans United considers itself an arm of that church in fighting for the principle of separation of church and state, but reserves the right to differ when an important legal principle is at stake. It is not in hostility to the Central Baptist Church or any church, but mindful of the great benefit of all churches of the principle of the separation of church and state, that we file this brief *amicus* to assist this court in preserving sound church-state relations under law in this country.

As the Maryland Court of Appeals said in the *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of relition. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

STATUTE INVOLVED

F.S. 192.06 (3) and (4) as interpreted by *Central Baptist Church of Miami, Florida, Incorporated v. Dade County, Florida,* 216 So. 2d 4.

QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the United States Constitution forbid a state to exempt from taxation real property owned by a church used primarily for commercial business purposes.

STATEMENT OF THE CASE

This action was brought by a group of citizens and taxpayers of Dade County, Florida who sought a declaration that an Act of the Florida legislature cited as F.S. § 192.06 (3) and (4) is unconstitutional as tending to establish religion and to inhibit the free exercise of religion in violation of the First and Fourteenth Amendments to the United States Constitution insofar as the Act authorizes tax exemption of church property used as a commercial parking lot. Plaintiffs also sought an injunction requiring the Dade County tax collector to assess and collect taxes on the church parking lot.

A three-judge federal panel was convened and the case was submitted on a Stipulation of Facts and a Motion for Summary Judgment. A three-judge federal panel on August 21, 1970, on the basis of *Walz v. Tax Commission* (397 U.S. 644 (1970), held that a state may exempt from taxation commercial properties owned and operated by churches. The court held that the Central Baptist Church's real property here involved is utilized six days a week as a commercial parking lot, the income from which is used for church or religious purposes. This property, it held, could be constitutionally exempted from taxes by the State of Florida.

SUMMARY OF ARGUMENT

This Court recently held in *Walz v. Tax Commission*, 397 U.S. 644 (1970) that real property owned by churches and used for worship function purposes may be exempted from taxation without violence to the Establishment Clause of the First Amendment. It was not held that real property owned by churches and used for commercial purposes may be so exempted. In fact, Mr. Chief Justice Burger noted that in *Gibbons v. District of Columbia*, 116 U.S. 404 (1886) Congress denied tax exemption to land owned by, but not used for, a church [for worship function purposes] "but rather to produce income." It is clear that this court regards worship function properties and commercial properties of churches as being in two separate categories—one may be taxed, the other may be exempted. The problem of taxation of the commercial properties of churches was not before the court in *Walz*, only properties used exclusively for religious purposes.

Properties used exclusively for religious purposes are but a small fraction of the tax-exempt burden on the working citizens. Such property, unavoidably, is needed in relatively modest amounts to carry on the identifying function of churches—their relationship of people with God. The problem of exemption or taxation of churches was not considered when the principle of church and state was being engrafted into our constitutional system by the drafters of the religious clauses of the First Amendment. Tax exemption for churches was not only not discussed, but, in fact, the problem was how to eliminate tax support for the churches.

Until the Federal Constitution was amended in 1791, the "State had the power to levy taxes for any public purpose, both to raise revenue and to regulate activities. If the "State" desired to tax the property of churches designed and used exclusively for religious purposes it could have done so. At that time in our nation's history, it was more likely that governments were using taxes to support religion

than to tax churches for revenue or control. After the First Amendment was adopted in 1791 and extended to the States by the Fourteenth Amendment adopted in 1868, it was clear that it was no longer a constitutionally legitimate end of government to either help or hinder churches in their religious functions. A new constitutional principle called, by Thomas Jefferson the separation of church and state, became the law of the land—a fundamental part of our political structure.

To summarize the argument presented in this brief, we believe that if the drafters of the religious clauses of the First Amendment were sitting as this Court, with all the information now available on the relationship of church and state, they would have accepted two basic principles concerning church taxation as being compatible with the plan envisioned by their amendments to the Constitution:

(1) Real property owned by religious organizations used exclusively for religious purposes and other property designed and used exclusively for religious purposes are exempt as a matter of right from taxation by virtue of the "free exercise" clause of the First Amendment as extended to the States by the Fourteenth Amendment of the United States Constitution.

(2) Real property owned by religious organizations and not used exclusively for religious purposes and other property not designed and not used exclusively for religious purposes are not exempt and cannot be exempted from such taxation as is imposed on similar property under similar circumstances owned and used by secular organizations by virtue of the Establishment Clause of the First Amendment as extended to the States by the Fourteenth Amendment of the United States Constitution.

The first principle having to do with the worship function properties of churches and religious organizations was adopted by the Court in *Walz v. The Tax Commission* (supra) which accepted *permissive* tax exemption for worship

function properties. The second principle will be settled in this litigation by this Court.

Thomas Jefferson and James Madison today would be truly proud of the religious peace which pervades this great land based on their work and the efforts of many others which resulted in the fundamental principle of separation of church and state being made a part of the Constitution of the United States. The riotous conduct of sectarians in Ireland today gives raucous witness that the evils which the principle of separation of church and state helps us avoid are relevant to contemporary society and that we deal with no academic abstraction. This Court here has another opportunity to clarify and preserve the constitutional basis of our religious freedom, which it has maintained so well, so far.

ARGUMENT

(1) REAL PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS AND NOT USED EXCLUSIVELY FOR RELIGIOUS PURPOSES AND OTHER PROPERTY NOT DESIGNED AND NOT USED EXCLUSIVELY FOR RELIGIOUS PURPOSES ARE NOT EXEMPT AND CANNOT BE EXEMPTED FROM SUCH TAXATION AS IS IMPOSED ON SIMILAR PROPERTY UNDER SIMILAR CIRCUMSTANCES OWNED AND USED BY SECULAR ORGANIZATIONS BY VIRTUE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT AS EXTENDED TO STATES BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On September 25, 1789, Congress proposed twelve articles of amendment to the Constitution of the United States. Except for the first two, they were ratified by the required number of States by December 15, 1791. These first ten amendments have since been known as the Bill of Rights.

The original congressional resolution stated: "The Conventions of a number of the States, having at the time of their Adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: . . .

> ". . .—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

These clauses are part of the "Bill of Rights". They have been explained in many opinions decided in this Court—the most notable of which is *Everson v. Board of Education,* 330 U.S. 1 (1947) where the general meaning of the Establishment Clause was clarified.

The restrictive clauses—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." are the accepted limitations on Government power with which we are here concerned.

Limitations on the power of the State to legislate on certain subjects characterize a limitarian form of government. No such restraints hobble a totalitarian state.

One of the results of the Civil War was that these clauses, which were originally only a restraint upon Congress, were extended to limit the power of the state legislatures. *School District of Abington Township v. Schempp,* 374 U.S. 203, and cases cited therein; *Murdock v. Pennsylvania,* 319 U.S. 105, 108; *Everson v. Board of Education,* 330 U.S. 1; *Zorach v. Clauson,* 343 U.S. 306; *McGowan v. Maryland,* 366 U.S. 420; *Torcaso v. Watkins,* 367 U.S. 488; and *Engel v. Vitale,* 370 U.S. 421.

It must be kept in mind that something new was added to political science by the religious liberty clauses of the First Amendment—namely, a principle which in the shorthand of popular parlance is called the separation of Church

and State. For most of the history of mankind the Church and the State have been linked together, not separate institutions. The distinguishing function of any State is that it regulates the relationships between persons and persons, and persons and things in the area over which its power extends and over the subject matter where it has jurisdiction. Where in a country the existence of "God" is accepted—and this has been almost everywhere save in today's Communist empires—there is recognized a relationship of person to person and person to things and to "God." To some this is the most important relationship of all.

Since a State seldom if ever taxed itself or its parts, it followed that early Governments did not tax religious properties. While in North America, the Church and the State were, in many ways, still partners, tax exemption of property used for religious purposes was taken for granted. (Cf. *All Saints Parish v. Inhabitants of the Town of Brookline* (178 Mass 404, 59 N.E. 1003 (1901)). In fact, tax support for religious functions was the rule rather than the exception. (Cf. Maryland, 1692, "An act for the Service of Almighty God and the establishment of the Protestant Religion within this Province.") In Pfeffer on *Church, State and Freedom*, at page 184, it is stated:

> "The universality of the exemption of church property from taxes in the United States is hardly open to doubt; constitutional or statutory provision for such exemption exists today in all states as well as in the District of Columbia. Churches, other houses of worship, and the land on which they stand are everywhere freed from tax levies, as is personal property devoted to religious uses." (Cf. also, *General Finance Corporation v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961) at p. 77).

Although one would expect that the constitutional basis for continuing the tax exemption of property used exclusively for religious purposes would have been thrashed out by our contentious ancestors at the time they separated Church and State at the federal level, a recent book, *"Should*

Churches Be Taxed?" by D.B. Robertson, points out the poverty of source material on this important subject.

> "There is nothing in the Federal Constitution of 1787 which grants tax exemption. There is nothing in the U.S. Constitution today which forbids the taxing of the property or income of religious groups, though there are those who think that exemption is implicit in the 'free exercise' clause of the First Amendment. It is significant that one finds no single reference to the question of tax status of church property in discussions of religion and the adoption of the religious clauses of the First Amendment. Even Madison, who entered a protesting note on what he had heard about proposals in Kentucky to exempt church property, does not seem to have raised the issue in his efforts in favor of the adoption of the religious clauses of the First Amendment .... One wonders, however, why the records show no single protest on the point of tax exemption for churches in the debates on the First Amendment. One must assume, as many commentators suggest, that even though our founding fathers were not necessarily overly pious men, they saw the social benefits of a 'free religion' and they assumed (in the absence of obvious signs to the contrary) that the American people approved the continued tax-exempt status of the various religious groups on a nonpreferential basis. They were, in other words pro-religious, if anticlerical or anti-ecclesiastical." (pp. 69-70)

In his book *The Folklore of Philanthropy* (1959), John Barzum throws a little folklore of his own:

> "It was the Founding Fathers—the men of letters who wrote the Declaration of Independence and the Federalist Papers—who laid it down as axiomatic that schools, churches, and other institutions for welfare should be tax-free. They fastened the custom upon us like an immemorial law." (p. 178)

The fact of tax exemption for the religious activities of churches has universally been taken for granted. President Ulysses S. Grant in recommending in his "State of the Union" message of December 7, 1875 that the Federal Constitution be amended to make church real properties subject to taxation obviously took for granted that the Constitution somehow prohibited such taxation. He recommended that all church properties be taxed except "only the last resting place of the dead, and possibly, with proper restrictions, church edifices." Similarly *Corpus Juris Secundum* reveals no questioning of the practice of state courts exempting the real estate of religious institutions from taxation especially where the exemption is spelled out in state constitutions and statutues. (84 C.J.S. 289-291). Arvo Van Alstyne in *Tax Exemption of Church Property*, 20 Ohio St., L.J. 461 (1959) points out:

> "Despite differences of emphasis, shortcomings of statutory language and unnecessarily voluminous litigation, it is evident that the policy of exempting church property from taxation is firmly rooted in American law."

Claude W. Stimson in his article *Exemption of Property from Taxation in the United States*, 18 Minn. Law Review 411 (1933-34), suggests that the "tradition" of tax exemption for churches comes from the fact that historically churches were public institutions not only exempt from taxes but actually supported by taxes.

> "A perusal of the history of tax exemption indicates that the granting of tax immunity to ecclesiastical and military property is probably as old as the institution of taxation. Church property, for example, was exempted under the doctrine that it ceased to be under human control when it was devoted to God. English history of the eleventh and twelfth centuries contains examples of ecclesiastical and military exemption as an accepted part of the tax systems.... The exemption of church and military property was handed down as a tradition, one of the many that the American colonists transplanted from

> Europe. The established colonial churches, in most cases, were public institutions supported from the government treasury." (p. 416)

This Court in *Walz* (1970)—almost one hundred years after President Grant grappled with the problem, put to rest the questions of the constitutionality of statutes granting tax exemption to "church buildings and ground actually occupied by such buildings." Previously, in *Gibbons v. District of Columbia,* 116 U.S. 404, 406 (1886), this Court held taxable real property owned by a church in the City of Washington and not used exclusively for religious purposes. The Court in language anticipating *Walz* (supra) pointed out:

> "Upon the construction most favorable to the appellant, these statutes exempt nothing from taxation beyond church buildings and grounds actually occupied for such buildings, and the lands or grounds appurtenant to any such building, so far as reasonably needed and actually used for its convenient enjoyment for its legitimate purpose. Even parts of the exempted buildings and lands, if used to secure a rent or income, or for any business purpose, are taxable. *But land which is neither actually occupied for a church building, nor reasonably needed and actually used for the convenient enjoyment of the building as a church, is not exempt from taxation, whether it is used for any other purpose or not.*" (p. 406-407) (Emphasis added)

This opinion is clear precedent for holding unconstitutional a statute exempting from taxation real property used by churches for commercial purposes.

It is widely recognized that the provision respecting religious liberty in the Virginia Declaration of Rights of 1776 and the First Amendment to the Constitution have influenced similar provisions in almost every nation.[1]

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[1]E.G., see Dr. C.A. Dunshee de Abranches, Protecao International Dos Dirietos Humanos (Brazil, 1964), pp. 39-40.

George Neolsine in his examination of constitutional provisions and practices of European nations noted that they have followed the procedure approved of in *Walz* of exempting property used for religious worship from taxation.[2] While our Country may go beyond the scope of other nations in protecting religious liberty, what others do and understand to be proper is clearly worthy of consideration by this Court in interpreting our Constitution.

Religion is deep in the hearts of the great majority of Americans—"religion" that is—not necessarily "churches." Churches ordinarily and rightly hold real property such as church sanctuaries and personal property designed for exclusively religious purposes. Both are used in the solemn and joyful task of relating persons to God. Many churches of late have branched out into the business world and now hold extensive real property for income or expansion purposes.[3] While few will long tolerate the States' secular presence to burden or harass the free exercise of religion by taxing their rituals and sanctuaries, their prayers and blessings, many will object to tax exemption for the commercial activities of churches. Our people, through their federal and state constitutions, have chosen to leave the relationships of people to God in the hands of the individual in his home or of the like-minded in their churches and synagogues.

To the extent that the worship function requires rituals, religiously designed personal and real property, architecture, poetry and music for its accomplishment, permissive tax exemption has been made part of our constitutional law by this court in *Walz* (supra). But it is clear that this court in *Walz* refrained from deciding anything save that which was presented in that Appeal, namely, whether or not it was

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[2]George Neolsine, Fiscal Aspects of Foundations and Charitable Donations in European Countries (European Cultural Foundation, (1963) p. 21.

[3]Franklin C. Salisbury, *Speaking of Politics* (1956) p. 128.

permissible under the Establishment and Free Exercise Clause for a state statute or constitution to authorize tax exemption for the worship function properties of churches. This court did not go into the question of whether these same clauses permit or authorize a state constitution or statute to permit tax exemption for the commercial properties of churches. The court below jumped to the conclusion that since the worship function properties of churches may be tax-exempt that, a fortiorari, commercial properties may be tax-exempt. The court below believes that tax exemption for the commercial properties of churches is even more entitled to tax exemption than tax exemption for the worship function properties of churches on the odd reasoning that less aid to religion results from aid to church commerce than from aid to worship.

Chief Justice Burger in *Walz* pointed out:

> "The general principle is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (Slip opinion p. 4)

Chief Justice Burger had previously explained that this "neutrality" insures "that no religion be sponsored or favored, none commanded, and none inhibited." While taxation of the worship function property of churches would clearly inhibit religion, taxation of the commercial properties of churches has no relevance to religion.

As a general rule is it not safe to say that there is no constitutional reason why private enterprise, and business in general, cannot be inhibited by Congress if it so desires? There are those who believe this is the general effect of most recent congressional legislative programs. There is little or no First Amendment protection for business enterprises even though they finance the exercise of First Amendment rights for everyone. Yet, business, particularly

the operation of parking lots, has done a pretty good job in this country even without such First Amendment protection. Churches, when they operate businesses, in effect desert their distinguishing function protected by the First Amendment and become involved in an unprotected operation. Why should churches be treated differently from any other parking lot operator? To exempt church commercial parking lots from taxation when similar parking lots operated by business enterprises are taxed is a form of discrimination in favor of churches which is forbidden by the religious clauses of the First and by the Fifth Amendments to the United States Constitution. Such an exemption unfairly and illegally discriminates against parking lot operators who must charge for their services to obtain funds to pay their taxes in competition with churches which do not. This probably makes the statute unconstitutional under the Fifth Amendment as well as the First!

We contend that while this Court in *Walz v. Tax Commission* (397 U.S. 644 (1970), has properly read the "free exercise clause" so as to stay the hand of the tax collector from burdening real property used for exclusively religious purposes, it is of equal importance that this Court clearly limits this exemption to strictly bona-fide religious functions. Otherwise a religious gold rush will be on cover almost everything under the term "religious" from bingo games and church business enterprises to hospitals and poorhouses.

Of course, real property is not designed as personal property usually is, and so its *use* is determinative of whether it is protected from taxation not its design. It matters less in this context what other types of property—money, pencils, stocks, bonds, are used for. It is what they are *designed and used* for that counts. It is too easily claimed that all property can be used to support religious activities. Property, other than real estate, to be protected from the State must be both used exclusively for religious purposes and be designed and made exclusively for religious purposes. For example, stained glass windows, church

organs, chalices and candlesticks, altars, hymnals and Bibles are designed and used for exclusively religious purposes. These, for the preservation of religious liberty, properly are exempt from taxation. Automobiles, private homes, stocks and bonds, parking lots, and business, while often "used" to support religious activities, are not designed for such use and are not ordinarily exclusively so used. These properties, even though they bring revenue, must be taxed when owned by churches just as they are when owned by secular organizations.

The requirement that real property be used exclusively for religious or worship-function purposes still leaves adequate room for local variations. The word "exclusively" can be interpreted broadly or narrowly in each of the fifty states with their several communities. The term "exclusively" will serve to eliminate activities which can reasonably be described as belonging to any additional category besides "religious." Such an activity as the operation of a parking lot open to all for a fee, obviously, is not one for exclusively religious purposes. A business organized to perform services such as permitting parishioners and others to park their cars may also serve God. But this merely means that the activity is pleasing in the eyes of the Lord.

We agree with Arvo Van Alystyne who pointed out in *Tax Exemption of Church Property:*

> "In some states, statutory provisions expressly deny exemption to otherwise qualified church property if income or revenue is derived therefrom." (p. 478).

In general, church property which produces income—even if the income is used exclusively for religious purposes—cannot be described as property used exclusively for religious purposes. Similarly, the word "religion" as used in the First Amendment avoids bringing under its umbrella activities which are not exclusively religious or would not have been considered so by the authors of these clauses. The "free exercise" protection was not directed at activities outside of "religion"—i.e., the relating of persons or things to "God",

or as Mr. Justice Douglas explains in *United States v. Ballard* (322 U.S. 72 at p. 87 (1944)): "Man's relation to his God was made no concern of the state." (Emphasis supplied)

It is unavoidable that any tax exemption which *Walz* permits to protect the exclusively religious functions of churches runs a risk of abuse in that there inevitably will be those who will attempt to extend the protection to activities other than religious, such as a parking lot operated for profit. The fundamental function of religion is to relate persons to God not to operate parking lots. God is a term not limited to the formal faiths of the Christian, Moslem or Judaist world, but is as broad as described in Salisbury's "Speaking of Politics" (1965)—available in this Supreme Court's Library.

> "A 'God' is any person, force or thing worshipped by a person or group of persons, the existence of which is beyond the scientifically verifiable, which has, or is described as having, an effective relationship with persons and things." (p. 264)

This distinction between the secular (parking lots) and the religious (worship, teaching) is one which would have been clear to the framers of the First Amendment but may not be so clear to our too sophisticated contemporaries. The draftees of the First Amendment carefully used the word "religion" not the word "church." This is a fine distinction—one more subtle than the difference between "religious" and "secular" (or nonreligious). Mr. Chief Justice Burger pointed out in *Walz* "that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution." We predict that the courts will have little difficulty determining when property is used for "religious" purposes and when property is used for commercial purposes, though church managers and treasures find this difficult.

This Court has at hand in the Library of Congress, in the original, Samuel Johnson's *A Dictionary of the English Language:* This is the same dictionary which James Madison had on his desk. In it the definitions are clear:

"Religion 1. Virtue, as founded upon reverence of God and expectation of future rewards and punishments. (If we consider it as directed against God, it is a breach of religion; if as to men, it is an offense against morality.) (South)

2. A system of divine faith and worship as opposite to others." x x x

"Divine 1. Partaking of the nature of God."

"God 1. The Supreme Being—God is a spirit, and they that worship him must worship him in spirit and truth. (John IV:24)"

Jefferson reiterated the then contemporary meaning of the term "religion" in his letter to the Danbury Baptist Association (8 Jeff. Works 113, cited in *Reynolds v. United States,* 98 U.S. 145, 164 (1878), where he wrote: ". . . religion is a matter which lies solely between man and his god . . ." This Court also recognized the definition found in Johnson's Dictionary and has limited the meaning of "religion" as Johnson did: "The term 'religion' has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will . . ." (*Davis v. Beason,* 133 U.S. 333, 342 (1889)). John Locke stated in 1689, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other . . ." Locke, *A Letter Concerning Toleration,* in 35 Great Books of Western World (1952—cited in *Schempp,* supra p. 231.)

Today, it is more and more apparent that churches undertake many activities which are not only not exclusively religious but actually are distinguishing functions of secular organizations which operate in the fields of labor relations, health, business, secular education, charities, and the like. Churches often claim the constitutional protections of the "free exercise clause" but are unwilling to admit that the same activities and property come under the prohibitions

of the "establishment clause." For example, the unrelated business activities of churches are familiar to the general public and to this Court. They have been thoroughly spelled out in "The Churches: Their Riches, Revenues and Immunities," by Martin A. Larson and C. Stanley Lowell (1969). In addition, the constitutionality of the tax exemption afforded by federal statute to the unrelated business income of churches is being contested in the Federal District Court in New York City in *Americans United v. Straford Retreat House.* (U.S.D.C. Southern Dist. of N.Y. Civil Action N. 289-69). There it is contended that tax exemptions, other than on the exclusively religious properties and functions of the church, violate both the "establishment" and "free exercise" clauses of the Federal Constitution. It is also subject to litigation in the Federal District Court in Baltimore, Maryland, in *Seversmith v. Machiz.* (U.S.D.C. District of Maryland Civil Action N. 15756).

The cry against the financial privileges of churches sheltered by numerous forms of tax exemption is not directed against the universal tax exemption on property used for exclusively religious purposes (*Walz* and *Gibbons,* supra) but against the exemptions and privileges enjoyed for other types of property owned by churches. The real social danger from the tax-exempt incomes and properties of churches arises from their income-producing properties—their unrelated businesses—not from their property used exclusively for religious purposes.

In conclusion, we respectfully urge this Court, to further clarify the religious clauses of the First Amendment to point out that churches may not be aided by government preference for their business activities over the same business activities carried on by private commercial interests. We urge that this Court point out that when a church goes into business it leaves the protection of the First Amendment which covers its religious activities and must stand on its own feet along with other institutions in the market place

of finance and commerce. In this way, the state will ever be neutral in its relations with religion and fair in its treatment of those whose business efforts finance the freedoms, rights, and privileges of all—and more often than not whose generosity finances the churches themselves.

CONCLUSION

For the reasons set forth herein, the decision of the Court below should be reversed.

Respectfully submitted,

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in the Supreme Court of the United States

OCTOBER TERM, 1970

70-47

No. [redacted] 1970

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

On Appeal from the United States District Court for the Southern District of Florida

APPELLANT'S BRIEF ON THE MERITS

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement of the Case	3
Summary of Argument	5
Argument	7
Conclusion	17
Proof of Service	18
Affidavit of Service	19

TABLE OF CITATIONS

	Page
Abington School District vs. Schempp, 374 U.S. 203 (1963)	13
Central Baptist Church of Miami, Florida, Incorporated, vs. Dade County, Florida, 216 So.2d 4	2
Everson vs. Board of Education, 330 U.S. 1 (1947)	13
Engel vs. Vitale, 370 U.S. 421 (1962)	13
Gibbons vs. District of Columbia, 116 U.S. 404 (1886)	6
McCollum vs. Board of Education, 333 U.S. 203 (1948)	13
Murray vs. Curlett, 374 U.S. 203 (1963)	13
Torcaso vs. Watkins, 367 U.S. 488 (1962)	13
Walz vs. Tax Commissioner of the City of New York, 25 L.Ed.2d 697, 90 S.Ct. 1409, (1970)	5
STATUTE	
F.S. 192.06 (3) and (4)	2
TEXT	
Martin A. Larson and C. Stanley Lowell, "The Churches, Their Riches, Revenues and Immunities"	14

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APPELLANT'S BRIEF ON THE MERITS[1 & 2]

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[1]All references will be to the *Record* inasmuch as the necessity for printing an Appendix was dispensed with by joint Motion and Order of this Court dated April 19, 1971.

[2]This brief is filed on behalf of one plaintiff only, Nishan Paul, and not on behalf of Florence Diffenderfer of the ACLU.

OPINION BELOW

The opinion of the three judge United States District Court (Rec. 305-311) is reported at 316 F.Supp. 1116.

JURISDICTION

This suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, and §1983 of 42 U.S.C. to enjoin the governmental tax exemption pertaining to the commercially utilized income producing real property owned by the defendant, Central Baptist Church of Miami, Florida, Incorporated. A three judge United States District Court was convened pursuant to 28 U.S.C. §2281 and §2284. The opinion of the three judge United States District Court was entered on August 21, 1970, and the Final Judgment of the Court in favor of the defendants was entered on October 5, 1970. Notice of Appeal and Amended Notice of Appeal to the Supreme Court of the United States were filed on September 18 and October 7, 1970. Probable jurisdiction was noted by this Court on February 28, 1971, and the time permitted for filing this Brief was extended to and including May 15, 1971. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., §1253.

STATUTE INVOLVED

F.S. 192.06 (3) and (4) as interpreted by **Central Baptist Church of Miami, Florida, Incorporated vs. Dade County, Florida, 216 So.2d 4** (contained in Appellants' Jurisdictional Statement).

QUESTIONS PRESENTED

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church-owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days of each week for commercial profit-making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

STATEMENT OF THE CASE

Appellants, who were the plaintiffs below, filed suit in the United States District Court against the defendants, appellees below, as a result of the governmental tax exemption granted to one of the defendants, Central Baptist Church of Miami, Florida, Incorporated, by and through the cooperation of the other defendants as it pertained to certain real property owned by the Central Baptist Church in Dade County, Florida. A Stipulation of Facts (Rec. 129-138) was entered into by the plaintiffs and the defendant Central Baptist Church. The following were included among the stipulated facts:

1. The defendant Central Baptist Church owns real property in Miami, Dade County, Florida which is being utilized six days each week for a commercial profit making purpose as recognized in the opinion of the three judge United States District Court.

2. That the said commercial parking lot occupies approximately fifty-nine percent of the church property.

3. That although this commercial parking lot operation brings in a substantial profit each year, the Dade County governmental authorities pursuant to F.S. 192.06 as interpreted by the Supreme Court of Florida in **Central Baptist Church of Miami, Florida, vs. Dade County, Florida**, 216 So.2d 4, exempted the said commercial parking lot from taxation.

The Final Judgment was entered against the amended complaint (Rec. 214-222) filed by the plaintiffs which had charged violation of the First and Fourteenth Amendments to the United States Constitution by F.S. 192.06 (3) and (4) itself, on its face, and as interpreted, construed, and applied to the plaintiffs and all others similarly situated by the afore-cited Florida Supreme Court decision. Plaintiffs herein also challenge the unconstitutional results obtained through the use of this statute wherein a profit-making commercial parking lot is granted tax exempt status solely as a result of its being owned by the defendant Central Baptist Church. The plaintiffs herein challenge only the commercial operated business, and not the property occupied by the church building itself. Stated another way, the amended complaint was not directed to the forty-one per cent (41%) of the property occupied by the church structures, but rather directed solely to the

remaining fifty-nine per cent (59%) of the church-owned real property maintained as a commercial parking lot six days of each week as stipulated to by the parties and as reflected in the opinion of the three-judge United States District Court. Subsequent to the filing of motions for summary judgment and various briefs filed by the respective parties, the three-judge U. S. District Court entered its opinion (Rec. 305-311) and thereafter its Final Judgment against the plaintiffs as to injunctive and other relief requested by the plaintiffs. Probable jurisdiction by this Court was noted on February 28, 1971.

SUMMARY OF ARGUMENT

This Court recently held in **Walz vs. Tax Commissioner of the City of New York**, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970) that real property owned by churches and used exclusively for religious purposes may be exempted from taxation without running afoul of the First Amendment to the United States Constitution. Left open, however, was the question of whether or not commercial businesses owned by religious institutions can also qualify for tax exemption without doing violence to the First Amendment. It can be seen, therefore, that we are confronted with two separate and distinguishable questions. The first has already been answered by the **Walz** decision. Religious institutions can qualify for tax exemption privileges on their property used exclusively for religious purposes. The second question, however, is: Can the various businesses, commercial enterprises and profit-making ventures owned by religious institutions also qualify for tax exemption in light of the prohibition on Established religion? We believe that the protective umbrella of tax exemption should not be permitted to cover the vast and far-flung profit-making commercial enterprises of re-

ligious institutions. Specifically, we are concerned with a parking lot owned by the Central Baptist Church of Miami and utilized six days of each week for a profit-making commercial business. The substantial profit made out of the commercial use of this real estate each year is the reflection of the proficient business operation of this property as a commercial parking lot six days out of seven days every week. As a result of the church ownership of this commercial operation and the cessation of business on Sundays, the church believes that it should properly enjoy an ad valorem tax exemption on the commercial parking lot. We believe that the church's position is untenable constitutionally, unjustifiable morally, and unsustainable logically. We further believe that if religious institutions are permitted to place their commercial businesses within the reasoning of the Walz decision, then, in that event, the establishment clause will have lost all its integrity, the churches most of their vitality, the government some of its sovereignty, and the church leadership all of its respectability.

Unfortunately, there has been a continuous assault on the wall of separation between church and state. Brick by brick, this wall envisioned by Thomas Jefferson and strengthened by James Madison, has been the subject of abuse and violence. Certainly, whatever reasoning can be utilized to sustain tax exemption for religious structures cannot be extended under any circumstances to the commercial businesses owned by churches. What a complete sham and mockery it will be if the public treasury is tapped by resourceful religious institutions stripped of their religious robes and girded by commercial garments. As I understand the Walz decision, the purpose of inserting reference to the decision of Gibbons vs. District of

Columbia, 116 U.S. 404 (1886) at the conclusion of the main opinion was to highlight and distinguish church-owned exclusively religious property as opposed to church-owned commercial property. We recognize, of course, that the **Gibbons** decision was not rendered pursuant to the Establishment clause, but rather to a specific statute. Nevertheless, we believe that the Court in **Walz** was indicating a clear dichotomy between what the church uses as religious property as opposed to what the church utilizes for profit-making commercial purposes. In any event, this Court will, by deciding the instant case, either bring the government into partnership with church-owned business ventures or, hopefully, declare that the church and the government are to remain free from the entanglements of the other, which otherwise would surely bring destruction to both.

ARGUMENT

THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT FORBIDS GOVERNMENTAL TAX EXEMPTION TO EXTEND TO CHURCH-OWNED COMMERCIAL BUSINESS ENTERPRISES, AND THAT THE TAX EXEMPTION GRANTED BY THE DEFENDANT, DADE COUNTY, FLORIDA, TO THE DEFENDANT CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA ON REAL PROPERTY UTILIZED SIX DAYS OF EACH WEEK FOR COMMERCIAL PROFIT-MAKING PURPOSES VIOLATES THE AFOREMENTIONED AMENDMENT TO THE UNITED STATES CONSTITUTION.

There are few cases in which the courts are presented with a record as clear-cut as that which is contained in this lawsuit. There is no factual dispute between the parties. The Stipulation of Facts entered into by the parties simplifies this lawsuit to its basic, common and all-pervasive question: whether or not the tax exempt status of the commercially-utilized parking lot owned by the defendant, Central Baptist Church of Miami, Florida, and which is used six days a week for profit-making purposes is in violation of the First and Fourteenth Amendments to the United States Constitution? This issue, of course, was made crystal clear when the Florida Supreme Court in **Central Baptist Church of Miami vs. Dade County, Fla., supra,** reversed the Circuit Court in and for Dade County, Florida, and enjoined the taxing authorities from collection of ad valorem taxes against a commercial parking lot in downtown Miami which is utilized six days a week for profit-making purposes and, in addition, happens to be owned by the Central Baptist Church. This lawsuit was made necessary when the Florida Supreme Court interpreted, construed and applied Florida Statute 192.06 (3) and (4), so as to bring the commercial parking lot within the protective ambit of tax exemption. The United States District Court in Miami upheld the tax exemption on the basis of **Walz vs. Tax Commissioner of The City of New York,** supra, despite the fact that the **Walz** decision involved property used exclusively for religious purposes and the property in the instant case involves property used almost exclusively for commercial purposes. The decision of the U.S. District Court is plainly and obviously opprobrious to the meaning and purpose of the First and Fourteenth Amendments to the United States Constitution forbidding the establishment of religion. In fact, the opinion of the U.S. District Court,

in reality, probably reads the Establishment clause out of the Constitution altogether. The District Court decision stated:

> "Does the holding in Walz vs. Tax Commissioner, supra, that there is no establishment of religion and no inhibition of the free exercise of religion in a state taxation scheme which exempts from taxation property used 'exclusively for religious purposes', i.e., 'religious properties used solely for religious worship'— encompass the tax exemption in the instant case as it applies to church property, used as a commercial parking lot? We answer affirmatively."

Apparently, the Court further extended the Walz decision by stating:

> "In short, there is nothing in the majority opinion in Walz which indicates that a state may not constitutionally construe its religious exemption statute to include church-owned, commercially used property when the proceeds go solely to church projects. Nor do we think that such an inclusion within the tax exemption scheme is arbitrary or capricious. Accordingly, we hold that F.S. 192.06 (4) constitutionally encompasses the fifty-nine per cent of the Central Baptist Church's property utilized six days a week as a commercial parking lot. Plaintiffs' Motion for Summary Judgment is denied, as to the relief sought by Plaintiffs, and judgment will be entered for all the defendants."

It is difficult to imagine any one decision rendered by a Federal court which could so quickly and simply cut out the heart of the Establishment clause. The U.S. District Court recognized the fact that the church owns 127,500 square feet in downtown Miami, and that approximately fifty-nine per cent of this property is utilized for commercial purposes six days of each week. The opinion is candid enough to recognize this fact. Nevertheless, the Court somehow and in some way comes to the conclusion that Walz also stands for the proposition of permitting tax exemption for this 59% of commercial property. We do not challenge the tax exemption for the forty-one per cent of the property utilized for religious purposes. But we are at a loss to understand how Walz can be interpreted to include the commercial businesses of the church, as well.

In fact, if we review the Walz decision, I think it becomes clear that the reasoning applied to church-owned religiously utilized property cannot also be applied to the church's commercial businesses, as well. Chief Justice Burger, in his analysis of the Establishment clause, determined that the legislative purpose of tax exemption in the Walz decision was not aimed at sponsoring or supporting religion; but can this same statement possibly apply when the State also seeks to exempt the commercial businesses of religious institutions? We think not. In addition, the Chief Justice cautions that the end result must not have the effect of an "excessive government entanglement with religion." Yet, as seen by the quotation in this Brief from the U.S. District Court decision, that decision is based, in part, on the apparent use of the profits made from this commercial business. In other words, the Court stated that the exemption is proper

"when the proceeds go solely to church projects." It would be difficult to imagine anything more entangling than for a government agency to go through church records each and every year to follow the course of the net proceeds generated from church businesses. If the government deemed the ultimate recipient as worthy, then, according to the United States Distrit Court decision, the exemption would hold. Apparently, if the agency decided that the ultimate recipient was not worthy, then I suppose the tax exemption woud be lifted. Not only is this excessive entanglement, but it also is degrading both to the government and to the church. Still another example of how the **Walz** Case is not applicable is the reference of the Chief Justice to the decision of **Gibbons vs. District of Columbia,** 116 U.S. 404, 408, 6 Sup.Ct. 427, 429, 29 L.Ed.680 (1886). This case is especially important because the Chief Justice was apparently referring to the substantial difference between religiously utilized property and property used to produce income. In fact, on Page 1417 of the **Walz** decision and referring to **Gibbons,** the Chief Justice stated:

> "In denying tax exemption as to land owned by but not used for the church, but rather to produce income, the Court concluded: . . ."

It is not only the Chief Justice's opinion which reflects the dichotomy between religiously utilized property and income producing property, but the concurring opinions, as well, reflect the distinction which must be made. In Mr. Justice Brennan's concurring opinion, he discusses on Page 1421 that churches use their facilities and personnel to carry on projects which other non-profit organizations would have to do. The discussion includes a statement that:

> "Accordingly, the funds used to maintain the facilities as a place of religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole."

How then can the U.S. District Court in the instant case use the reasoning of Mr. Justice Brennan to apply to the commercial businesses of religious institutions? The reasoning would have no logical connection whatsoever.

Still further, Mr. Justice Brennan, on Page 1420 of the **Walz** decision quotes **Gibbons vs. District of Columbia,** supra, to the effect:

> "We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also used to add to its beauty and attractiveness, may, **if not used or intended to be used for any other purpose,** be exempt from taxation under the statutes." (Emphasis supplied by this writer.)

The "any other purpose" is clearly seen in the instant case wherein the real property is utilized six days of each week as a commercial business, and only on Sunday as a free parking area.

We also find the reasoning of Mr. Justice Harlan, in his concurring opinion, equally inapplicable to the commercial property of churches. On Page 1426, the footnote states in part:

> "While I would suppose most churches devote part of their resources to secular community projects and conventional charitable activities, it is a question of fact, a fact that would only be relevant if we had before us a statute framed more narrowly to include only 'charities' or a limited class of organizations, and churches. In such a case, depending on the administration of the exemption, it might be that an exemption to religion would turn out to be improper. This would depend, I believe, on what activities the church in fact sponsored."

We could discuss the various "establishment" cases which have come before the U.S. Supreme Court in the last 25 years. We could, in addition, quote various passages from those decisions, but, as the Chief Justice pointed out in the **Walz** decision, reliance on a particular phrase or paragraph may be misleading as to the intent of the Court. Nevertheless, we should like to at least indicate that the reasoning in the following cases is important for purposes of defining acceptable boundaries for the Establishment clause. **Everson vs. Board of Education,** 330 U.S. 1 (1947); **McCollum vs. Board of Education,** 333 U.S. 203 (1948); **Torcaso vs. Watkins,** 367 U.S. 488; **Engel vs. Vitale,** 370 U.S. 421 (1962); **Abington School District vs. Schempp,** 374 U.S. 203 (1963); **Murray vs. Curlett,** 374 U.S. 203 (1963).

At this point, we would like to discuss briefly the three positions taken by the defendant, Central Baptist Church of Miami, to support the tax exempt status they claim. First, the church has, during the course of this litigation, made reference to the financial troubles of the

church and the economic problems incumbent with the administration of their church. Our response to this is that, first and foremost, the constitutionality or unconstitutionality of the issue in this suit does not and cannot depend upon the financial circumstances of the church. We wish the church well in their work, but we cannot accept the justification of tax exemption on the basis that the church will suffer financial difficulties. In addition to this, we point out to the Court that the taxes which rightfully should be paid would come out of substantial profits made each year by this commercial parking lot, and therefore the church is giving nothing but a small portion of the substantial profit made each year. Still further, it would seem that religious institutions are not nearly as impoverished as claimed, as can be seen in **Larson and Lowell, The Churches: Their Riches, Revenues and Immunities** (1969). Therefore, even if the argument concerning the church's financial difficulties was relevant, which it is not, the factual allegations are subject to serious suspicion. Secondly, the church argues that the proceeds of the business go to worthwhile projects. In fact, the U.S. District Court decision is based in part on this conclusion, as can be seen by the quotation from that decision referred to earlier in our Brief. Once again, we do not believe that what the church does with its net profits from its commercial businesses would be relevant or material to the constitutionality or unconstitutionality of tax exemption for those businesses. The exemption will have to stand or fall on its own merit without reference to where the business profits ultimately end up. In addition, certainly the "entanglement" referred to by Chief Justice Burger in the **Walz** decision becomes mammoth in the light of a governmental agency or bureaucrat running through church records each year, to trace the business profits to their

ultimate end. Thirdly, the church argues that the real property is used on Sunday free of charge for its worshippers and therefore the property is as necessary as the roof on the church building itself. We believe this argument to be specious. Even accepting the fact that in downtown Miami parking is difficult, and that parking spaces would be required to service the parishioners, the tax exemption is not necessary even if the parking spaces are required. Nor is it necessary that the property be used commercially for the remainder of the week (six days). Therefore, the use of the parking spaces on Sunday and the claimed tax exemption on the basis that it is a necessary part of aiding the parishioners must fall as hypocritical and illogical.

Since the days of Presidents Jefferson and Madison, this country has been particularly sensitive to the prohibitions well thought out by these two great Presidents. This nation and its courts have recognized that the reasons which lay behind the First Amendment are sound and as alive today as they were in the days of witchcraft burnings and religious persecutors. Presidents Jefferson and Madison well realized what it would mean for a pluralistic society with various religions and denominations as well as non-religionists, to request the aid of government and, in particular, to compete for the tax dollar. At the present time, the United States contains many sects of religious thought and worship. It is probably one of the great strengths of this country that we have cultural diversity and richness provided by various religious faiths and practices. The horror and nightmare of these various faiths competing for the tax dollar and governmental recognition was all too clear to the founders of our nation whose forefathers had fled their European

homes for religious freedom in the Colonies. More currently, the spectacle of religious strife and violence in Northern Ireland amply demonstrates the eventual result of governmentally established religion. Surely, the competition would be greater and the violence more widespread in a society as religiously pluralistic as ours. Rather than prolong this Brief with various references to excellent texts on the subject of separation of church and state, we would choose to close our Brief by simply asserting our belief in the integrity of the Establishment clause and the free exercise clause to the United States Constitution. We believe further that the equal protection clause demands that the taxpayers of Dade County be protected from subsidizing the commercial businesses of religious institutions. If all other business operations, including other parking lot operators, are required to pay taxes, why should a parking lot owned and operated by the Central Baptist Church be any logical exception? What justification can there be for any religious institution to go into the open market and compete with other businesses at a substantial commercial advantage derived from the privilege of lower overhead through a tax exemption? It would seem that elemental fairness would dictate that once the men of the cloth wear the garments of mercantile interests, then their rights, and privileges should be no less and no more than offered to all other businesses. Accordingly, we ask that the justice contained in the very teachingings of this church be dispensed with the righteousness for which this church stands.

CONCLUSION

For reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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I, HOWARD J. HOLLANDER, attorney for the appellant Nishan Paul, says, under oath, that on the _____day of _____, 1971, I caused copies of the foregoing Appellant's Brief on the Merits to be served on the several parties thereto as follows: MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, 1600 First National Bank Building, Miami, Florida; THOMAS C. BRITTON, Esq. Attention St. Julien P. Rosemond, Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, and FLORENCE DIFFENDERFER, Co-Plaintiff.

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Sworn to and subscribed to before me, at Miami, Florida, this _____ day of _____, 1971.

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Notary Public, State of Florida
At Large

My Commission Expires _____

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

—v.—

70-47

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT FLORENCE DIFFENDERFER

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
The Constitutional and Statutory Provisions Involved	2
Questions Presented	4
Statement of the Case	4
Summary of Argument	5
ARGUMENT:	
I. *Walz* does not require a determination that the Establishment Clause of the First Amendment allows tax exemption of church-owned property used as a profit-making commercial enterprise if the profits are used for religious purposes	7
A. *The Holding in* Walz	7
B. *The Presumption of Constitutionality From Acceptability*	10
C. *The Absence of Excessive Entanglement*	13
II. Whether measured by the no-aid test of *Everson* or the purpose-effect test of *Schempp*, tax exemption of church-owned commercial enterprises is constitutionally impermissible under the Establishment Clause	16

PAGE

A. *The* Everson *Test* 16

B. *The* Schempp *Test* 19

III. Invalidation of exemption for church-owned commercial enterprises serves the First Amendment purpose of avoiding church-state tensions and conflicts between sacred and secular interests 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 6, 16, 19, 20

Board of Education v. Allen, 392 U.S. 236 (1968) 19-20

Central Baptist Church of Miami v. Dade County, 216 So. 2d 4 (1968) 4

DiCenso v. Robinson, 316 F. Supp. 112 (1970) 21

Epperson v. Arkansas, 393 U.S. 97 (1968) 16, 17, 19

Everson v. Board of Education, 330 U.S. 1 (1947) 6, 16, 17, 18, 19, 22

Gibbons v. District of Columbia, 116 U.S. 404 (1886) 12, 13

Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) 10

PAGE

McCollum v. Board of Education, 333 U.S. 203 (1948) 16, 17, 18

McGowan v. Maryland, 366 U.S. 420 (1961) 16, 17, 18

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 10

Prince v. Massachusetts, 321 U.S. 158 (1944) 17

Roth v. United States, 354 U.S. 546 (1957) 16

Schenck v. United States, 249 U.S. 47 (1919) 16

Torcaso v. Watkins, 367 U.S. 488 (1961) 16, 17, 18

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) 5, 7, 8, 10, 12, 13, 16, 17, 18, 20, 21, 23

Constitutional Provisions:

United States Constitution

First Amendment 2, 4, 7, 13, 22, 24

Fourteenth Amendment 2, 4, 6, 24

Federal Statutes:

26 U.S.C. §511(a)(2)(A) 13

28 U.S.C. §1253 2

28 U.S.C. §1331 5

28 U.S.C. §1343 5

28 U.S.C. §2201 5

28 U.S.C. §2202 5

42 U.S.C. §1983 5

Tax Reform Act of 1969

P.L. 91-172 §121(a)(1) 12-13

PAGE

State Statute:

Florida Statute 192(06) 2, 4

Other Authorities:

Henry III. 36 11
7 Edw. I. 13-1279 11
13 Edw. I. 32 11
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Charter of 1217 c. 43 11

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N. Lo Bello, *The Vatican Empire* (1969) 23

F. Pollock and F. Maitland, *The History of English Law*, vol. 1, p. 333 (1898) 11

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1,042

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

—v.—

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT FLORENCE DIFFENDERFER

Opinion Below

The opinion of the United States District Court for the Southern District of Florida is reported at 316 F. Supp. 116. It is reprinted as Appendix A to the Jurisdictional Statement herein, pp. App. 1-8.

Jurisdiction

The decision of the three-judge District Court was filed August 21, 1970. The judgment thereon was entered on October 5, 1970. A notice of appeal therefrom to this Court was filed on October 7, 1970. On February 28, 1971, the Court noted probable jurisdiction.

The jurisdiction of this Court rests on Title 28 of the United States Code, Section 1253.

The Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "I. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ."

The Fourteenth Amendment to the United States Constitution provides in part:

> " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (F.S.) 192(06), provides in part as follows:

"192.06 Property exempt from taxation.—The following property shall be exempt from taxation:

* * * * *

"(3) Such property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purpose for which they have been or may be organized; provided, not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal or charitable purposes of said institutions; provided, further, that nothing in this subsection shall be construed as applying to special assessment by municipalities for sidewalks, curbing, street paving or other local improvements.

"(4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property."

Questions Presented

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

Statement of the Case

This action was brought by the appellants as taxpayers in the State of Florida challenging the validity of F.S. 192(06) as interpreted and applied by the Supreme Court of Florida in *Central Baptist Church of Miami* v. *Dade County,* 216 So. 2d 4 (1968). In that case, the Court held that the statute exempted from real estate taxation the parking lot adjacent to the church and located on its property which was used on Sundays for free parking by those attending services but was operated at other times as a commercial lot for the general public in downtown Miami. The Florida court held also that the exemption did not violate the state constitution since "[t]he record conclusively reflects the church devotes the net income received by it from rentals of the commercial parking lot area to religious and educational purposes." (The decision is reprinted at pp. App. 11-20 of the Jurisdictional Statement herein.)

Following this decision, the present action was brought under Sections 1331, 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 of the United States Code. A three-judge court was convened and the case was submitted on stipulated facts and the plaintiffs' motion for summary judgment. The District Court delayed decision pending determination by this Court of the case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970). Thereafter, the District Court handed down its decision that under *Walz* a state may "constitutionally construe its religious exemption statute to include church-owned property when the proceeds go solely to church projects," and held accordingly "that F.S. 192.06(4) constitutionally encompasses the 59% of the Central Baptist Church's property utilized six days a week as a commercial parking lot." (Jurisdictional Statement, pp. App. 6-7.)

Summary of Argument

The District Court erred in construing *Walz* to require a holding that under the Establishment Clause a state may exempt from taxation church-owned land used for non-religious profit-making purposes so long as the profits are applied exclusively to the church's religious activities. The presumption of constitutionality arising from long-standing and universal acceptance in the case of exemption of property used exclusively for religious purposes does not extend to property used commercially even though the profits are used for religious purposes. More importantly, excessive entanglement in church affairs, avoidance of which was the basis of *Walz,* is not involved in taxation of commercial enterprises owned by churches.

In the absence of these countervailing factors, the Court should judge the constitutionality of tax exemption of church-owned commercial enterprises by the standards set forth in *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and its progeny and *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) and its progeny. Measured by these standards, the statutory exemption cannot stand, for it constitutes forbidden aid to religion under the *Everson* principle and has as its purpose and primary effect the advancement of religion within the meaning of the *Schempp* test.

While the plaintiffs herein are not commercial parking lot operators and therefore may not have the requisite standing to assert the Equal Protection Clause of the Fourteenth Amendment, the Court in applying the Establishment Clause may and should consider the tensions and conflict necessarily resulting from state-accorded advantages to churches in their competition with private commercial enterprises, a factor not present where church-owned property is used exclusively for religious purposes and hence not in competition with commercial enterprises.

ARGUMENT

I.

Walz does not require a determination that the Establishment Clause of the First Amendment allows tax exemption of church-owned property used as a profit-making commercial enterprise if the profits are used for religious purposes.

A. *The Holding in* Walz

In *Walz,* the Court upheld the constitutionality of a New York statute exempting from taxation land and buildings owned by churches and used exclusively for religious purposes. The District Court deemed itself bound by that decision, and indeed in both the majority opinion of Judge Dyer and the concurring opinion of Judge Eaton expressed the view that a statute such as the one involved in the present suit is less vulnerable to constitutional challenge under the Establishment Clause than the New York statute. In its opinion, the majority said (Jurisdictional Statement, pp. App. 5-6):

> *Walz* makes no attempt to define what kinds of property may or may not be encompassed by an exemption scheme except to say that property used solely for worship can be included. On oral argument in *Walz* plaintiff's counsel stated that he was attacking tax exemptions only as applied to "property used exclusively for religious purposes" and not other property, such as schools or hospitals operated by religious institutions, because it was only the exemption to the *worshipping activity* (and not to other church activities) which he contended created an establishment of religion. See 38 LW 3189. Viewed in this light, it is clear that the

limitation in the *Walz* opinion to property used exclusively for religious worship was merely a mechanism to put the case in the posture of dealing with the *ultimate* religious activity and the Supreme Court nevertheless held there was no establishment of religion and no inhibition on the free exercise thereof. *A fortiori*, a use of church property for slightly *less* religious purposes [the parking lot proceeds go to the church's educational and charitable activities as well as to its religious activities] does not create an establishment of religion and does not inhibit the free exercise of religion. * * * (Emphasis in original.)

In his concurring opinion, Judge Eaton stated (p. App. 8):

> If tax exemption granted on property used *solely for religious worship* does not constitute an establishment of religion or effect a prohibition of the free exercise thereof, then a tax exemption granted on property used as a profit-making parking lot does not. (Emphasis in original.)

We believe the District Court was in error in so interpreting *Walz*. There is a vast difference between tax exemption for property used partly for religious and partly for educational and charitable purposes on the one hand and property used partly for religious and partly for commercial purposes on the other. The Court in *Walz* noted the difficulties that would arise should church exemption be limited to social welfare operations. The Court said (397 U.S. at 674):

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that

some churches perform for parishioners and others—family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Obviously, these considerations do not apply to commercial operations. Moreover, there are at least two other reasons why the Court could rule constitutional tax exemption of property used exclusively for religious (or religious and other non-profit) purposes without necessarily being required to uphold exemption of church-owned property used for profit-making commercial purposes: first, the inference of constitutional validity from the long-time and ubiquitous acceptance of the former does not hold true in respect to the latter, and second, the excessive state entanglement in church affairs which might accompany the former would not be present in the case of the latter.

B. *The Presumption of Constitutionality From Acceptability*

In *Walz,* both the Court's opinion by the Chief Justice (397 U.S. at 676-678) and the concurring opinion of Mr. Justice Brennan (at 681-687), stressed that tax exemption for churches went back to the earliest days of the Republic; both recounted its history in considerable detail; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic," and his statement in *Jackman* v. *Rosenbaum Co.,* 260 U.S. 22, 31 (1922) that "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it * * * "; and both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption for church property, the Court held, is strong if not conclusive evidence of its constitutionality.

But this ancient and ubiquitous acceptance relates only to church property used for church purposes. In respect to church property used for profit-making commercial purposes, history and practice point in exactly the opposite direction. Implicit in acceptability of church ownership of property used for worship was a recognition that the amount of such property withdrawn from the tax rolls would necessarily be limited and moderate in quantity; there is after all only so much space that can be used for worship. Unlimited, however, is the amount that can be acquired and used for profit-making purposes as commercial enterprises.

Opposition to church acquisition of properties not needed for worship has a history and universality which at least matches exemption from taxation of properties which are needed for worship. The various mortmain statutes dating from medieval England, particularly *De Viris Religiosis* (Stat. 7 Edw. I. 13-1279) testify to this. F. Pollock and F. Maitland, *The History of English Law,* vol. 1, pp. 333-334 (1898).[1] Opposition was based in large measure not only on the inalienability of the property but also on its withdrawal from the sources on which the secular state relied for financial and other contributions needed to maintain it.

Indicative of the truism that there is very little new under the sun and of the fact that the contemporary "sale and lease-back" operation to avoid taxation (see D. Robertson, *Should Churches Be Taxed?* 123-132) has ancient forbears is the Charter of 1217 c. 43. This provided that one was not to enfeoff a religious house and then take back the land as tenant of that house. According to Pollock and Maitland (vol. 1, p. 333, footnote 6),

> [t]he mischief to be prevented seems to be this:—Some favoured religious bodies, e.g., the Templars, have royal charters which by general words set free all the lands that they now have, or shall hereafter acquire, from many burdens. A man gives land to such a house, and then becomes that house's tenant, and as such he claims immunity under the charter.

Mortmain statutes are not unknown in the United States (see C. Zollman, *American Church Law,* 164-168 (1933)),

[1] Other mortmain statutes include Henry III. 36; 13 Edw. I. 32; 15 Rich. II. 5; 23 Henry VIII. 10.

but more relevant is the widespread opposition to exemption from taxation of church-owned property used for commercial purposes. See, D. Robertson, *Should Churches Be Taxed? passim* and particularly Chapter VI; R. Drinan, *Religion, the Courts and Public Policy,* 12 (1963). Even the major church groups do not favor such exemption. Thus, in its brief *amicus curiae* in *Walz,* the United States Catholic Conference states (p. 26-27, footnote 8):

> In arguing that houses of religious worship constitutionally may be afforded exemption from State real estate taxation, this *amicus* does not defend exemptions from taxation accorded church properties used or operated for commercial purposes and has so advised Congress and the public. Joint Statement of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)* before the Senate Committee on Finance, 91 Cong. 1st Sess. 83 (May 2, 1969) (unofficial print).

The long-standing unacceptability of exemption of church-owned property used for commercial purposes is further manifested by the District of Columbia statute construed by the Court in *Gibbons* v. *District of Columbia,* 116 U.S. 404 (1886), and even more significantly by the fact that from the beginning of state tax exemption laws the overwhelming pattern among the states has been to limit the exemption to property used either exclusively for worship or in some states, incidental thereto, such as parsonages or houses used for retreats. C. Antieu, P. Carroll and T. Burke, *Religion Under the State Constitutions,* chapter 6 (1965). The most recent manifestation of this unacceptability is the Tax Reform Act of 1969 (P.L. 91-172

Sec. 121(a)(1)) which ended the short-lived exemption of the unrelated income-producing operations of churches (Title 26, U.S.C. Sec. 511(a)(2)(A)).

We do not, of course, equate unacceptability, ancient and ubiquitous as it may be, with unconstitutionality. Nor do we even assert that a presumption of unconstitutionality is raised thereby.[2] We suggest only that the strong inference of constitutionality which both the Chief Justice and Mr. Justice Brennan stressed in their opinions in *Walz* is not present in this case and does not protect the statute challenged herein from the searching judicial scrutiny to which all laws infringing upon First Amendment rights are subject.

C. *The Absence of Excessive Entanglement*

The fundamental rationale of *Walz* is that a major purpose of the Establishment Clause is the avoidance as far as possible of state involvement in church affairs. The decision does not deny that tax exemption is an aid to churches, and a substantial one at that, but the Court deemed paramount the countervailing factor that exemption entails less state entanglement in church affairs that does taxation. The Court said (397 U.S. at 674-675):

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or

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[2] We note, however, that the question is at least reserved in *Gibbons* v. *District of Columbia*. There the Court said (116 U.S. at 407):

> We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also to add to its beauty and attractiveness, may, *if not used or intended to be used for any other purpose,* be exempt from taxation under these statutes. (Emphasis added.)

supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. *Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government* by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards but that is not this case. * * * (Emphasis added.)

Whatever entanglement may be involved in assessing an *ad valorem* tax on a parking lot used for commercial purposes certainly verges on being *de minimis*. If experience is a trustworthy teacher, we can be reasonably sure that it involves no excessive entanglement in church affairs for, as has been shown, non-exemption of church-owned income-producing commercial property has since the beginning of

exemption been the norm rather than the exception. There are few standards which can be used to assess the value of land and building used exclusively for worship, and hence "direct confrontations and conflicts" between church and state can be expected. This, however, is hardly true in respect to the valuation of a commercial parking lot which happens to be owned by a church. The operation of commercial parking lots is a major business in today's auto-oriented society, and there is no lack of standards that are employed for tax evaluation purposes. Should any state entanglement ensue from evaluation and enforcement, it would be entanglement in the parking lot business, not in church affairs.

As we have noted, Congress has eliminated the exemption from Federal taxation of income from church-owned businesses. Certainly this necessitates considerably more entanglement and "sustained and detailed administrative relationships" than the one-time assessment of the value of land. Yet, can it be suggested that the Tax Reform Act of 1969 is therefore unconstitutional to the extent that it eliminates the exemption?

The crux of the matter is that the major reason for upholding exemption from taxation of property used for religious purposes—the avoidance of excessive state entanglement in church affairs—is absent in the case of church-owned commercial enterprises. The constitutionality of such an exemption can therefore be determined in accordance with well-accepted standards for interpreting and applying the Establishment Clause.

II.

Whether measured by the no-aid test of *Everson* or the purpose-effect test of *Schempp*, tax exemption of church-owned commercial enterprises is constitutionally impermissible under the Establishment Clause.

A. *The* Everson *Test*

In *Everson*, the Court said (330 U.S. at 16) that "Neither a state nor the Federal Government may * * * pass laws which aid one religion, aid all religions, or prefer one religion over another." This principle was reiterated in *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948), *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 493 (1961) and *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968). In *Walz* the Court said that this test was difficult to apply and noted that in Mr. Justice Jackson's view the decision in *Everson* was irreconcilable with the test it pronounced.

Yet, every test under the Establishment Clause is difficult to apply; it requires, as the Court said in *Walz*, walking a "tight rope." (397 U.S. at 672.) And this is no less true of perhaps all constitutional tests. This is evidenced by the many divided decisions under the clear and present danger test announced in *Schenck* v. *United States*, 249 U.S. 47 (1919), and the obscenity test announced in *Roth* v. *United States*, 354 U.S. 546 (1957), to cite but two of many available examples. (In contrast it may be noted that there was only one dissent in *McCollum*, one in *McGowan* and none in *Torcaso*.) But the difficulty of applying a valid test in a borderline case should not deter the Court from applying it in a clearer case, else no test would survive.

The statute providing for bus transportation of children to parochial schools at public expense was upheld in *Everson* because the aid to religion was an incidental by-product of a statute having the secular purpose of protecting children from traffic hazards and because the state's interest in the safety of children outweighed the strictures of the Establishment Clause. (*Cf. Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where the Court reached the same result in a case of tension between the state's interest in the welfare of children as expressed in a child labor law and the mandate of the Free Exercise Clause.) In *McGowan,* the Court again found that the aid to religion was an incidental byproduct of a valid secular statute and that the state's interest in assuring to workers one day rest in seven outweighed possible encroachment on both the Establishment and Free Exercise Clauses. On the other hand, the Court found no sufficiently weighty countervailing interests in *McCollum* (religious instruction in public schools), *Torcaso* (religious test for notaries public), or *Epperson* (anti-evolution statute).

Walz itself, notwithstanding its comment on the no-aid test as stated in *Everson,* does not repudiate that test. It is certainly of some significance that not only the decision but the opinion in *Walz* was concurred in by Mr. Justice Black, the author of the opinions in *Everson, McCollum* and *Torcaso. Walz* did not hold that devoid of countervailing interests aid to religion is constitutional; it held only that excessive state entanglement in church affairs may constitute a sufficiently weighty countervailing interest.

No countervailing interest is to be found in the present case. As we have sought to show, taxation of a church-owned commercial enterprise brings with it no significant

state entanglement in church affairs. Nor is there any apparent countervailing secular interest, or at least none sufficient to justify the patent state aid to religion. Here we have direct governmental aid to religion which, as Mr. Justice Brennan noted in his concurrence in *Walz* (397 U.S. at 690) provides economic assistance to churches which may exceed in value that of a direct subsidy. (See also statement of Mr. Justice Harlan, at p. 699, that "exemptions do not differ from subsidies as an economic matter.")

The "no-aid" principle which we have quoted from *Everson* appeared in the following paragraph (330 U.S. at 16), which was repeated in *McCollum, McGowan* and *Torcaso*:

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

We believe that taxation of commercial enterprises, or indeed other property such as residences owned by non-church individuals or groups, while church owners are exempt, is inconsistent with the statement that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We are of the opinion that neither as a matter of realistic economics nor constitutional law is it significant that the tax dollar of the non-exempt cannot be traced directly or on a one to one to the cost of governmental services accorded to church-owned property.

For these reasons, we submit that the statute challenged herein violates the Establishment Clause as construed and applied in *Everson* and the cases affirming and applying its principles.

B. *The* Schempp *Test*

In *Schempp,* the Court, in invalidating a Bible reading statute under the Establishment Clause, said:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion (347 U.S. at 222).

The test was used in *Epperson* (along with the no-aid test) to invalidate an anti-evolution law and in *Board of*

Education v. *Allen,* 392 U.S. 236 (1968), to uphold a law providing free use of publicly owned textbooks by children attending nonpublic schools. In *Walz,* in neither the Court's opinion nor either of the opinions of Mr. Justice Brennan or Mr. Justice Harlan is reliance placed upon application of the *Schempp* test. (*Schempp* is not even cited in the Court's opinion.) This, we believe, is an implicit recognition that standing alone tax exemption for churches could not survive that test, but was upheld only because of the presence of the countervailing factors of long-standing universality and avoidance of excessive entanglement in church affairs. Since these factors, as we have sought to show, are not present in cases involving church-owned commercial enterprises, we submit that the statute challenged herein is unconstitutional under the purpose-effect test of *Schempp.*

In *Walz,* the Court did say (397 U.S. at 672) that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion * * * ." We suggest respectfully that this statement should be reconsidered. We find it difficult to believe that the advancement of religion is not a major, if not the only, purpose of exemption to churches. It is possible that legislatures, perhaps anticipating the *Walz* rationale, grant exemption only to avoid entanglement in church affairs. This, however, seems hardly likely either historically, in view of the fact that exemption dates from a period when the state was heavily entangled in church affairs, or realistically in contemporaneous society.

The Court in *Walz* distinguished exemption from subsidization—a distinction rejected by both Mr. Justice Harlan and Mr. Justice Douglas; but even if the distinction

is valid, that does not negate the reality that both mean money in the pocket for churches and that the state's generosity in both cases is predicated on the assumption that religion is a good thing and should be helped financially. This, to us, means that the state's purpose is to advance religion, no less than that its purpose in granting exemption to educational and charitable institutions is to advance education and charity.

Irrespective of purpose, however, it would be difficult to deny that the effect of exemption is to advance the cause exempted. In *Walz*, the Court and the concurring Justices carefully avoided doing so. True enough, the Court held that exemption has the effect of avoiding entanglement, but this hardly constitutes a denial that it may also have the effect of advancing religion. As to which is the "primary" effect, we commend to the Court the following statement from the District Court's opinion in *DiCenso* v. *Robinson*, 316 F. Supp. 112 (1970), now before this Court on appeal:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect", as *Schempp* seems to re-

quire, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

In any event, in the present case the Court is not faced with the task of ranking the legs of a table in order of importance nor of determining which effect of the exemption statute is primary and which secondary. As we have sought to establish, the amount of entanglement in church affairs involved in taxing its commercial enterprises is minimal, so that even if there be a leg marked "avoidance of entanglement" it is too short to reach the floor and hence plays no significant role in upholding the table of church-state separation.

III.

Invalidation of exemption for church-owned commercial enterprises serves the First Amendment purpose of avoiding church-state tensions and conflicts between sacred and secular interests.

If there was any one purpose which the Establishment and Free Exercise Clauses of the First Amendment were designed to achieve it was the avoidance of the bitter church-state conflicts which had bloodied the pages of Old World history for more than fifteen hundred years. *Everson,* the first decision of this Court to explore in depth the historical background of the religion clauses of the First Amendment, emphasized this aspect of the issue, as did the dissenting opinions of Mr. Justice Jackson and Mr. Justice Rutledge. There is hardly an account of the American experiment in church-state separation which does not lay great stress on its important role in avoiding or ameliorating conflicts and tensions between sacred and secular interests.

This concept was most recently expressed in Mr. Justice Harlan's opinion in *Walz*, wherein he said (397 U.S. at 695):

> While these concepts ["neutrality" and "voluntarism"] are at the "core" of the Religion Clauses, they may not suffice by themselves to achieve in all cases the purposes of the First Amendment. As Professor Freund has only recently pointed out in Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion. Thus, as the opinion of THE CHIEF JUSTICE notes, religious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against.

The mortmain statutes to which we have referred reflect the tensions between the sacred and the secular as manifested in large scale church acquisition of lands and their withdrawal from the obligations due to the secular state. There can be little doubt that these tensions and the politicization of religion are inevitable concomitants of tax exemption for church owned commercial enterprises. See, D. Robertson, *Should Churches Be Taxed?* (1968); M. Larson and C. Lowell, *The Churches; Their Riches, Revenues and Immunities* (1969); N. Lo Bello, *The Vatican Empire* (1969); A. Balk, "God Is Rich," *Harper's Magazine*, October 1967.

The plaintiffs herein are not commercial parking lot operators and therefore may not technically have the requisite standing to assert the Equal Protection Clause of the Fourteenth Amendment in the narrow sense. Nevertheless, it is, we believe, entirely appropriate for us to suggest that the Court in applying the Establishment Clause may and should consider the tension and conflict necessarily resulting from state-accorded advantages to churches in their competition with private commercial enterprises, a factor not present where church-owned property is used exclusively for religious purposes and hence not in competition with commercial enterprises. Such consideration must lead to the conclusion that the interests sought to be protected by the Religion Clauses of the First Amendment would best be served by denying to churches the substantial competitive advantage of tax exemption in the world of business and industry.

CONCLUSION

For the reasons stated herein, the judgment of the District Court should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1971

NO. 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

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Appellees.

On Appeal from the United States District Court for the Southern District of Florida

BRIEF OF APPELLEE CENTRAL BAPTIST CHURCH OF MIAMI

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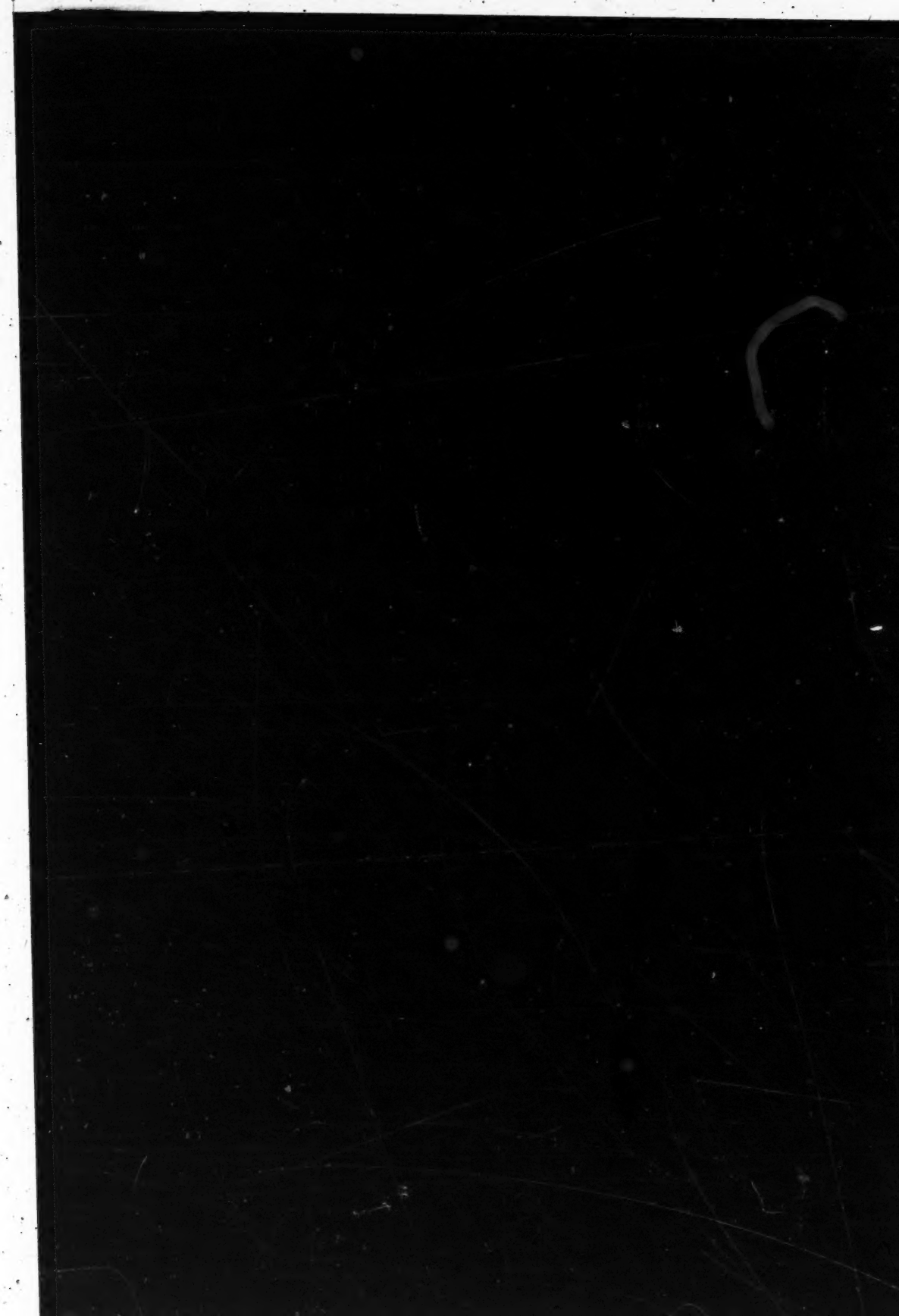

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	13
ARGUMENT	21
I. The Case Is Moot	21
II. Appellants Have Misconceived the Constitutional Issue	24
III. The Structure of American Tax Exemptions	29
IV. The No Establishment Clause	33
(a) The *Walz* Decision	33
(b) Entanglement: Avoidance	39
(c) Entanglement: Surveillance	45
(d) Entanglement: Politics	48
(e) History: The Incidental Use Doctrine	49
(f) History: The "Destination Principle"	50
V. The Free Exercise Clause	52
VI. The Equal Protection Clause	53
CONCLUSION	55
PROOF OF SERVICE	57
APPENDIX	App. 1-21

TABLE OF CITATIONS

Case	Page
Abington School District v. Schempp, 374 U.S. 203 (1963)	35, 42, 52
Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232 (1890)	53
Board of Education v. Allen, 392 U.S. 236 (1968)	52
Bryan v. Austin, 354 U.S. 933 (1957)	23
Central Baptist Church of Miami v. Dade County, 216 So.2d 4 (1968)	3, 6, 10, 15, 21, 25
City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965)	23
Congregation B'nai Yisroel v. Township of Millburn, 35 N.J. Super. 67, 113 A.2d 182 (1955)	14
Congregational Union v. Zangerle, 138 Ohio St. 246, 34 N.E.2d 201 (1941)	14
Coppack v. Blount, 145 So.2d 279 (Fla.App.3d 1962)	23
Daniel v. Goliday, 398 U.S. 73 (1970)	23

TABLE OF CITATIONS (cont.)

Case	Page
Diffenderfer v. Central Baptist Church of Miami, 316 F.Supp. 116 (1970)	2, 40
Engel v. Vitale, 370 U.S. 421 (1962)	52
Everson v. Board of Education, 330 U.S. 1 (1947)	35
Flast v. Cohen, 392 U.S. 83 (1968)	52
Follett v. Town of McCormick, 321 U.S. 573 (1944)	17
Gibbons v. District of Columbia, 116 U.S. 404 (1886)	38
Immanuel Presbyterian Church v. Payne, 55 Cal.App. 1125, 265 P. 547 (1928)	14
Johnson v. George, 119 Colo. 153, 200 P.2d 931 (1948)	23
Jones v. Opelika, 316 U.S. 584 (1942), *reversed on rehearing,* 319 U.S. 103 (1943)	17
Lemon v. Kurtzman, 403 U.S. 602 (1971)	35, 43, 45, 48

TABLE OF CITATIONS (cont.)

Case	Page
McGowan v. Maryland, 366 U.S. 420 (1961)	52
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	17
Robinson v. DiCenso, 403 U.S. 602 (1971)	35, 41, 46, 49
Robinson v. Robins Dry Dock & Repair Co., 238 N.Y. 271, 144 N.E. 579, *error dismissed* 271 U.S. 649 (1926)	23
Selective Conscientious Objector Cases, 401 U.S. 437 (1971)	42, 47
Sunday Closing Law Cases, 366 U.S. 420 (1961)	42, 47
Tilton v. Richardson, 403 U.S. 672 (1971)	34, 35, 41
Torcaso v. Watkins, 367 U.S. 488 (1961)	52
Walz v. Tax Commission, 397 U.S. 664 (1970)	14, 16, 33, 34, 35, 36, 37, 39, 42, 48, 50
WHYY v. Borough of Glassboro, 393 U.S. 117 (1968)	53

TABLE OF CITATIONS (cont.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
Florida Constitution (1968)	
Art. VII, § 3	2
Florida Sessions Laws	
Chap. 71-133, 1971 Laws, Second Legislature	3
U.S. Constitution, Amendment I	2, 17, 20, 24
U.S. Constitution, Amendment XIV (Due Process Clause)	2, 17, 20, 24
U.S. Constitution, Amendment XIV (Equal Protection Clause)	20, 24, 54
Internal Revenue Code of 1954, as amended	
§ 102	37
§ 170(b) (1) (A)	18, 26
§ 508(c) (1)	18
§§ 501-3	26
§ 511 (before Tax Reform Act of 1969)	24, 25, 26
§ 512(b) (16)	18
§ 6033(a) (2)	18
§ 6043(b)	18
§ 7605(c)	18

TABLE OF CITATIONS (cont.)

	Page
Tax Reform Act of 1969, P.L. 91-172, 83 Stat. (1969)	25
Florida Statutes Annotated	
§ 192.06(1967)	21, 22, 26
§ 192.06(3) (1967)	15, 21
§ 192.06(4) (1967)	2, 3, 15, 21, 23, 24, 25
§ 196.191(4) (1969)	2, 3
§ 196.012 (1971)	3, 22
§ 196.192 (1971)	3, 22
§ 192.196 (1971)	4
Code of Metropolitan Dade County § 33-124(d)	12
City of Miami, Ordinance 6871	12

OTHER AUTHORITIES

5 Am.Jur.2d 205 (App. & Error § 763)	23
Bennett, "Real Property Tax Exemptions of Non-Profit Organizations", 16 *Cleveland Marshall L. Rev.* 150 (1967)	30
Bittker, "Churches, Taxes and the Constitution," 78 *Yale L. J.* 1285 (1969)	24

TABLE OF CITATIONS (cont.)

	Page
"Church Parking Lots as Related to Tax Exemptions," 75 A.L.R.2d 1106 (1961)	30
Constitution of the United States of America: Analysis and Interpretation (U.S. GPO, 1964)	53
"Construction of Exemption of Religious Body or Society from Taxation or Special Assessment," 168 A.L.R. 1222, 1233-58 (1947)	30
84 *Corpus Juris Secundum* §§ 282, 291	30, 31
"Exemption of Charitable Organization from Taxation or Special Assessment," 34 A.L.R. 634, 659-77 (1925), 62 A.L.R. 328, 334-39 (1929), 108 A.L.R. 284, 292-97 (1937)	30
Freund, "Public Aid to Parochial Schools," 82 *Harvard Law Review* 1680 (1969)	44
12 Mertens, *Law of Federal Income Taxation*, "Exempt Organizations," §34.14	26, 50
Montgomery, "Expanding the Rolls," Wall Street Journal, Oct. 14, 1971, p. 1, col. 6	40

TABLE OF CITATIONS (cont.)

	Page
National Council of the Churches of Christ in the United States of America and the United States Catholic Conference, Joint Statement, *Hearings before the Senate Committee on Finance on H.R. 13270*, 91st Cong., 1st Sess. 83 (May 2, 1969)	25
Note, "Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes," 64 *Harvard Law Review* 288 (1950)	30
Perovich, "Garage or Parking Lot as within Tax Exemption extended to property of Educational, Charitable, or Hospital Organizations," 33 ALR 3rd 938 (1970)	30
Perovich, "Tax Exemption of property used by Fraternal or Benevolent Association for Club House or similar purposes," 39 ALR 3rd 640 (1971)	30
Psai, "Receipt of Pay from Beneficiaries as affecting Tax Exemption of Charitable Institutions," 37 ALR 3rd 1191 (1971)	30
Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio State Law Review* 461 (1959)	30, 39

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Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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BRIEF OF APPELLEE CENTRAL BAPTIST CHURCH OF MIAMI

INTRODUCTORY STATEMENT

As permitted by Rule 40, Section 3, this appellee adopts the statement of appellant Florence Diffenderfer with respect to the opinion of the court below, the jurisdiction of this Court, and the constitutional and statutory provisions involved. In June, 1971, pursuant to a new Florida Constitution, the State of Florida repealed the statutory provisions involved in this case and adopted new laws to govern tax exemptions of property partly used for the production of income. Accordingly, appellee inserts at this point the relevant parts of the new enactments.

A new Florida Constitution was adopted on November 5, 1968[1]; the tax exemption section of Article VII of the new Constitution states:

> "§3. Taxes — exemptions
>
> "(a) . . . . Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation."

Section 192.06(4) became §196.191(4), *Fla. Stats.* in 1969.[2] At that time, only the number designation was changed, the substance of the statutory exemption of religious property was identical to that which was before the Florida Supreme Court in a suit involving this church prop-

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[1] 25 F.S.A. 665 (1970).

[2] 10 F.S.A. 293 (1971).

erty and its exemption from ad valorem taxation.[3] The 1971 Florida Legislature changed the Florida taxation provisions, including the statute which had been §192.06(4) and §196.191(4). Chapter 71-133, 1971 Laws, Second Legislature[4] repealed §196.191 *Fla. Stats.* (1969), and made the following pertinent changes:

> §196.012 Definitions
>
> "For the purpose of this chapter the following terms are defined as follows except where the context clearly indicates otherwise:
>
> (1) Exempt use of property means predominant or exclusive use of property for educational, literary, scientific, religious, charitable or governmental use as defined in this act.
>
> (2) Exclusive use of property means property that is used one hundred per-cent (100%) for exempt purposes. Such purposes may include more than one class of exempt use.
>
> (3) Predominant use of property means property used for exempt purposes in excess of fifty percent (50%) but less than exclusive.
>
> * * *
>
> §196.192 Exemptions from ad valorem taxation.
>
> (1) All property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

---

[3] *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (Fla. 1968).

[4] West's Florida Session Law Service 362-370 (1971).

(2) All property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the non-exempt use.

§192.196 Criteria for determining that portion of charitable, religious, scientific or literary property entitled to exempt status

In determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable, religious, scientific, or literary purpose, the following criteria shall be applied:

(1) The nature and extent of the charitable, religious, scientific or literary activity of the applicant, a comparison of such activities with all other activities of the organization, and the utilization of the property for charitable, religious, scientific or literary activities as compared with other uses.

(2) The extent to which the property has been made available to groups who perform exempt purposes, at a charge that is equal to or less than the cost of providing the facilities for their use, or the extent to which services are provided to persons at a charge that is equal or less than the cost of providing such services. Such rental or service shall be considered as part of the exempt purposes of the applicant. Only those portions of property used predominantly for charitable, religious, scientific or literary purposes shall be exempt. In no event shall an in-

cidental use of property either qualify such property for an exemption or impair the exemption of an otherwise exempt property.

* * *

As a result of these changes in the Florida statutes, appellee believes that this case has become moot.

Whether this case is moot or not, appellee totally rejects appellants' statements of both the "facts" and the "questions" in this case. On the whole, appellants' statements are cast as though the exemption here in question were special to churches, and as though the property involved were office buildings or other property, blocks removed from the Church and not used at all for church functions. In point of fact, as appellee will develop in detail below, the exemption at issue in this case was common to all charitable nonprofit organizations in the State of Florida. The property involved is a parking area that is both contiguous with the Church and a functional, physical, essential and necessary part of the over-all facilities of the Church. Accordingly, appellee finds it necessary to restate the Questions Presented and the Statement of the Case.

QUESTIONS PRESENTED

1. Is a case mooted by repeal of the state statute which is the subject of constitutional attack?

2. May a State, consistently with the First and Fourteenth Amendments, include churches on an equal footing with other charitable nonprofit organizations in the general category of tax exempt organizations?

3. May a State, consistently with the First and Fourteenth Amendments, exempt from ad valorem taxes the property of charitable nonprofit organizations, including churches, that is both (1) indispensable and primarily used, every day and every evening throughout the week, for the accomplishment of their exempt purposes, and (2) partially used during the business hours of the week, to the extent that it is not needed for exempt purposes, for the production of income to be used for exempt purposes?

STATEMENT OF THE CASE

The Jurisdictional Statement and the Briefs of both appellants contain numerous, and seriously prejudicial, misstatements of fact. Apparently, appellants feel that no weight is to be attached to the decision of the Supreme Court of Florida in *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (1968). This decision was based on the absolute necessity of the parking area, and its actual dominant use for the church functions of appellee. More importantly, appellants almost totally disregard the Stipulation of Facts which they agreed to in the Federal District Court in this case. Appellants are free to challenge the constitutionality of the exemption here in question. They are not free to contradict their Stipulation.

For example, appellants say four times in their Jurisdictional Statement that the parking area was used six days and six evenings a week for commercial purposes. They also say that the stipulated facts included the use of the parking area "six days and six nights each week

for a commercial profit-making purpose, as recognized in the opinion of the three-judge United States District Court" (p. 4).

In point of fact, there was no such stipulation, nor did the three-judge court below recognize any such stipulation. The principal facts stipulated with respect to the *use* of the parking lot are set out immediately below. Emphasis has been supplied where necessary. (The Stipulation of Facts is reprinted in full as Appendix B to appellee's Motion to Dismiss or Affirm; page references are to this appendix, as "Motion App.")

> . . . *All of this property* is being used by the Church in the conduct of and for the purpose of furthering its religious, educational, literary, benevolent, fraternal, and/or charitable activities. (Motion App. 3)
>
> The Church is located in the heart of a great metropolitan area, and is required to maintain the PARKING AREA for the use of its congregation due to the inadequacy of on-street and off-street parking facilities in the vicinity. When the PARKING AREA is not so used, this being during the *week-day business hours*, parking facilities in the vicinity are greatly needed by the general public. *Part of this parking space is used every day of the week* by people attending Church and Church functions and meetings, but rather than permit *that portion not so used* to lie vacant when unused by church people, the Church rents the PARKING AREA to the public charging reasonable rental fees therefor. (Motion App. 5)

The area of the off-street parking spaces for which the Church makes charges on week-days is less than 75% of the total of the real property owned by the Church in the city block, and is an integral and functional and physical part thereof, and is an indispensable and essential Church property used by the Church solely and exclusively in furtherance of the religious, educational, literary, benevolent, fraternal and charitable purposes and objects . . . . (Motion App. 7-8)

The Church never has made, and does not make, any charge of any kind for any of its off-street parking spaces used at any time for any purpose stated in any of the foregoing paragraphs numbered (i) to (xxvi), inclusive [a list of the Church functions, and the times they occur, for which the parking lot is used], and has made, and now makes, charges only on week-days (Monday through Saturday) for such of its off-street parking spaces *as are not in use for any of these purposes.* (Motion App. 11)

As admitted in the Supreme Court of Florida, *this Church could not operate in this location without these parking spaces.* They are just as necessary for the operation of the Church as the roof over the Church Building. In the argument, the following conversation took place:

Q. (Justice Drew, from the bench, asked the attorney for the County), "Mr. Simon, could this Church operate in its present locality without these parking spaces?"

A. "No, Your Honor, it could not."

Q. "Mr. Simon, aren't these parking spaces just as necessary for the operation of this Church as the roof over the building itself?"
A. "Yes, Your Honor, they are." (Motion App. 11-12)

Despite these stipulations by the appellants in the court below, appellants somehow feel free in this Court to caricature the parking lot as simply a "church-owned commercial enterprise." They feel free to put in the Stipulation things that are not there (night-time rental of the lot) and to leave out things that are there (necessity and dominant use for church functions; weekday, as well as evening and Sunday use for church services and meetings).

Stipulations play a vital role in shortening the fact-finding process at the trial level. If appellants are free to do what they have attempted to do in this case, the value of stipulations will be destroyed. Appellants must be held to what they have stipulated and must be confined to argument of the only issues really presented by the stipulated facts.

A full statement of the relevant facts of this case would require repetition at this point of all the facts stipulated between the parties. In the interest of brevity, appellee respectfully draws the attention of this Court to the Stipulation of Facts (Appendix B in appellee's Motion to Dismiss or Affirm). There the story of the present use of the parking lot is fully and fairly told.

The Court, however, may be interested in how and why the parking lot came into existence, and why it is so necessary for the functioning of the Church. The heart

of the answers to these questions is contained in the following statement by the Supreme Court of Florida in *Central Baptist Church v. Dade County*, 216 So.2d 4, 5 (1968):

> In respect to the practical problems and necessities involved, the Appellant church congregation made an evidentiary showing that as its congregation grew it was necessary over the past several years for it to acquire with church funds additional lots in the block where its church building is situated for its congregants' car parking. (Reprinted in Appellants' Jurisdictional Statement, App. 14)

The "evidentiary showing" to which the Supreme Court of Florida refers in this passage was an affidavit made by Miller Walton, Esq., chairman of the Finance Committee of the Central Baptist Church. This affidavit is printed as Appendix A to this brief.

According to the United States Census Bureau, Dade County had a 1930 population of 131,268. (The church was built in 1928.) In 1970 the population was 1,267,792, almost ten times greater. Throughout this period the Central Baptist Church has been at its present location. The neighborhood, however, has changed dramatically. It is now in the heart of the downtown Miami business area.

In 1936, when the Church was incorporated, it did not own any of the real property involved in this litigation (Appendix A, *infra*, pp. 2, 10.) At that time, many people walked to the Church, others drove automobiles, and off-

street parking was no problem. By 1940, however, it had become imperative for the Church, in order to survive, to provide some additional off-street parking area. Accordingly, the congregation purchased Lots 6 and 7 (see the map at App. 12 in appellee's Motion to Dismiss or Affirm) and donated them to the Church.

After World War II ended, and automobiles and gasoline again became available to the public, the Church found it necessary to provide still more parking facilities. The situation became particularly acute when the Church constructed its Sunday School Educational Building on land which had previously been used, in part, for parking. Meantime the business growth of the surrounding area made it increasingly difficult for members of the Church to find on-street parking spaces. By 1950 it had become imperative for the Church, if it was to survive, to enlarge the off-street parking area to the greatest extent possible and as rapidly as possible. (Appendix A, *infra*, pp. 12-13.)

Accordingly, between 1950 and 1959 the Church acquired the rest of the parking lot area whose exemption is contested in this case. This provided the Church with a total of 290 parking spaces. Even this, however, has become totally insufficient for the needs of the congregation and of others who attend the services, functions and meetings at the Church. Most of these people reside from 5 to 15 miles from the Church throughout Dade County. Public transportation is utterly inadequate as a means of travel to or from the Church. When people want to come to the Church, they have to have a place to park their automobiles; otherwise they cannot come. (Appendix A, *infra*, p. 6.)

Since 290 spaces are not nearly enough, the Church has arranged for the use on Sundays of a large number of commercial off-street parking facilities in the immediate neighborhood of the Church. These facilities are made available, without any charge, for persons attending services and functions at the Church. (Appendix A, *infra* p. 15.)

The auditorium of the Church has a seating capacity of approximately 2200. If the congregation should attempt, at this time, to build a church of comparable size on any other property in the City of Miami, except within the C-3 (Central Commercial) District, City Ordinance 6871 would require the congregation to provide 440 off-street parking spaces. If a new church were built in the unincorporated area of the county, the Code of Metropolitan Dade County § 33-124(d) would require the congregation to provide 550 off-street parking spaces. (Appendix A, *infra*, p. 16)

So far, therefore, from being a parking lot that the Church exploits commercially, the parking area in this case is not even big enough for the Church's own needs. Parking spaces are rented to the public only during weekday business hours, and then only to the extent that such rental does not deprive the Church of the parking facilities it needs every day and every evening of the week. (Motion App., supra, pp. 5, 8, 9, 10).

This summary of the facts about the origin, use and necessity of the parking lot, as established by the stipulation of the appellants and the decisions of the Supreme Court of Florida in the *Dade County* case and of the

Federal District Court below, make one point incontestably clear: the primary purpose and dominant, indispensable use of the parking lot involved in this case is, throughout the week, for the services, functions and meetings of the Central Baptist Church of Miami.

Finally, in order to correct any possible misapprehension by this Court, appellee finds it necessary to enter a formal denial of Mr. Salisbury's statement in the POAU brief *amicus* (supporting the appellants) that the Central Baptist Church of Miami is a "supporting member of Americans United". (Brief of Protestants and Other Americans United for Separation of Church and State as *Amicus Curiae*, p. 4). Even if true, of course, the statement would not change the law in this case. The Central Baptist Church, however, is not a member of that organization and never has been. Prior to 1969, appellee did contribute $100 each year for a few years, but it has contributed nothing since that time. Such contributions, needless to say, did not make appellee a member of POAU any more than a contribution by John Smith in New York to the YMCA in Miami would make him a member of the Miami YMCA.

SUMMARY OF THE ARGUMENT

The real facts and questions in this case have been stated. The constitutional argument revolves around those facts and questions. Fortunately for the appellee, two of the basic premises involved are already resolved. One is of fact, the other of law.

1. *Fact.* The Church could not operate without this parking area. It is as necessary as the roof over the building itself.

2. *Law.* This Court held, in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), that ad valorem tax exemption of church property used for a house of worship does not constitute an establishment of religion, or prohibit the free exercise thereof.

It follows that if this parking area were not rented at all to the public, there could be no question of the constitutionality of the tax exemption here at issue. Florida is far from the only jurisdiction to recognize the necessity of parking facilities for churches, especially in congested metropolitan areas. See, for example, *Immanuel Presbyterian Church* v. *Payne*, 55 Cal.App. 1125, 265 P. 547 (1928); *Congregation B'nai Yisroel* v. *Township of Millburn*, 35 N.J.Super. 67, 113 A.2d 182 (1955). Although some States have a more restrictive policy (see *Congregational Union* v. *Zangerle*, 138 Ohio St. 246, 34 N.E.2d 201 [1941]), the difference is to be explained in terms of State constitutional and statutory provisions, not requirements of the federal Constitution. *Walz* is controlling on the federal issue; and, under *Walz*, property that is essential for a house of worship may constitutionally be exempted from ad valorem taxes.

If the present case can be distinguished from *Walz*, the only basis for distinction is that some of the parking spaces that are not needed for church functions during weekday business hours are rented to the public. Until repeal of the statutes involved in this case, the State of Florida, following the "incidental use" doctrine with

respect to former F.S.A. § 192.06(4), held that such partial, incidental use of the parking lot did not result in loss of the ad valorem exemption. As the Supreme Court of Florida explained when Dade County tried to tax the parking lot:

> We further find that the limited part-time rental of a portion of the church lot for commercial parking in week day business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and not a sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property.

Central Baptist Church v. *Dade County*, 216 So.2d 4, 6 (1968).

In reaching this decision, the Supreme Court of Florida was greatly influenced by former F.S.A. § 192.06(3), which permitted charitable nonprofit organizations (other than churches) to rent out not more than 75% of their home facilities without loss of the ad valorem exemption, providing that the rental income was used for the exempt purposes of the charitable organizations. The Supreme Court of Florida judged that "equitable principles" made it difficult to accord different exemption treatment to churches from that accorded to other charitable nonprofit organizations. 216 So.2d at 7.

The question before this Court, of course, is not equity but constitutionality. Put one way, the issue might read: "Is the incidental use doctrine constitutional as applied to church property in common with other

charitable nonprofit organizations?" Looked at in a somewhat broader view, the case might be seen as involving the constitutionality of the "destination principle," since Florida required exempt organizations to use the rental income for their exempt purposes.

Concentration, however, on the "income-producing" aspect of the parking area tends to obscure a much more fundamental issue. In the *Dade County* decision, the Supreme Court of Florida held that churches, both because of the "incidental use" doctrine and because of equitable considerations, were entitled to the same tax exemption treatment under Florida law as other charitable nonprofit organizations. The fundamental constitutional question in this case, therefore, is whether a State is free to include churches within the general category of charitable nonprofit organizations for tax exemption purposes and to apply to them, as part of that class, the same rules about "incidental" or "income-producing" use that it applies to the entire class.

Walz v. *Tax Commission*, 397 U.S. 664 (1970), does not answer this question explicitly, but it leaves only one answer possible: Yes. *Walz* does not answer the question explicitly, because the plaintiff focused his attack, and this Court focused its consideration, on an exemption of property used for absolutely no other purpose than a house of worship as the supreme example of forbidden governmental aid to religion. This Court recognized that churches use their property for other community functions besides religious worship, but refused to ground the constitutionality of the exemption on the public welfare services that churches perform. 397 U.S. at 674.

Walz rests squarely on the twin pillars of history and "benevolent neutrality." This Court based its decision sustaining the constitutionality of the exemption of the sanctuary on (1) the antiquity and universality of the exemption in American law and (2) our constitutional heritage of a public policy of "benevolent neutrality" towards churches and religious exercises, so long as there is neither preference of, nor interference with, religion.

Giving churches the same exemptions accorded to other charitable nonprofit organizations is fully in accord with this policy of "benevolent neutrality," as shown by the universal practice of the States and the Federal Government in this regard. If this case involved a tax exemption given only to churches, different constitutional questions would come into play, just as the constitutional problem would be different if churches were denied a tax exemption given to all other charitable nonprofit organizations. But the exemption here in question is solidly in the stream of American tax exemption history — it is common to churches and all other charitable nonprofit organizations.

Walz did not say, and appellee does not suggest, that churches *must* be treated in all respects, including taxation and exemption, exactly like other charitable nonprofit organizations. Such a doctrine might well be pernicious, obliterating as it would the special status given religion and religious organizations by the First and Fourteenth Amendments. The free exercise of religion cannot be taxed. See *Jones* v. *Opelika*, 316 U.S. 584 (1942), *reversed on rehearing*, 319 U.S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). Moreover, the First and Fourteenth

Amendment prohibition against "excessive entanglement" of the government with religious affairs might well necessitate, or at least justify, special tax provisions for churches in certain instances. See, for example, the special auditing and financial reporting provisions that Congress has enacted for churches in the Internal Revenue Code of 1954, §§ 6033(a)(2), 6043(b), and 7605(c) as amended. Still other considerations might justify subdividing exempt organizations, including churches, into various classes, with different degrees of tax relief for each. See, for example, the Internal Revenue Code of 1954, §§ 170(b)-(1)(A), 508(c)(1) and 512(b)(16), as amended.

There is no question, however, in the present case of what a State *has* to do, or of any preference of, discrimination against, or entanglement with religion. The State of Florida has chosen (and still chooses, in the amended form of the statutes involved in this case) to treat churches, with respect to ad valorem tax exemptions, exactly the same way it treats other charitable nonprofit organizations. The permissibility of such a policy is the only issue in this case.

Appellants assert that there is no history to support the tax exemption of "church-owned commercial enterprises." If they are talking about ad valorem taxes and a church-owned girdle factory, they are right. If they are talking about the Central Baptist Church parking area, they are completely wrong. Every State and Territory in the country follows some version of the "incidental use" doctrine. Exempt organizations, including churches, are permitted to conduct a wide variety of fund-raising operations, with a more or less commercial flavor, on the

premises of their home facilities. There is no rule that to be exempt, charitable organizations must derive all their income from gifts. They must be *nonprofit*, not *nonproductive*.

The State of Florida has simply differed from most other American jurisdictions by permitting exempt organizations to derive rental income as well as traditional forms of non-donated income from use of their home facilities without loss of the ad valorem exemption. Now Florida has joined the other States by adopting a policy of partial or total ad valorem taxation of income-producing real estate. The fact that Florida has changed its policy does not mean that its former course of action was unconstitutional.

If the parking area cannot be rented at all without constitutional cancellation of the exemption, it is impossible to see why the same forfeiture must not follow upon the use of exempt facilities for dinners, picnics, bazaars and other social functions to which the public is invited and for which a charge is made. Churches, in particular, despite their traditional function as the "Meeting-Houses" of 18th and 19th-century America (a function they still perform in many parts of the country), will no longer be able to rent their facilities to such community groups as the Boy Scouts. If the line is drawn at "rental for profit," rather than mere "rental," the States will inevitably become deeply entangled in church finances. If the "rental" doctrine is pushed to its logical extreme — as it never has been in any State or Territory — even pew rents and payments for synagogue seats during the High Holiday Services will become constitutionally suspect.

Appellants ask this Court to declare tax exemptions for "church-owned commercial enterprises" unconstitutional. Again, if appellants are talking about church-owned factories or mercantile establishments, that is not this case. Appellants have chosen the wrong defendant. If appellants *are* talking about this case, they are asking this Court to lay down a doctrine absolutely novel in American law and flatly rejected by every American jurisdiction throughout our history. *Some* income-producing use of the home facilities of charitable nonprofit organizations, including churches, has always been permitted by State and Federal law.

The history of tax exemptions for churches has been singularly devoid of that "political divisiveness" which the First Amendment was designed to prevent. This is shown by the fact that *all* churches benefit from the exemptions, and that *all* jurisdictions have followed the same basic policy.

In addition to their No Establishment claim, appellants also raise Free Exercise and Equal Protection issues. They have, however, shown absolutely no coercive effect of the Florida tax exemption on the practice of their own religion. Accordingly, their Free Exercise claim is frivolous. With respect to the Equal Protection Clause, appellants have no standing to raise the question of unfair competition by appellee with commercial parking lot operators. Significantly, appellants made no effort, or were unable, to find a commercial establishment that felt it was being unfairly competed against. More importantly, if there is an Equal Protection issue in this case, it is on appellee's side rather than appellants. Churches cannot be excluded from the general category of charitable nonprofit

organizations without a compelling governmental interest. Any other doctrine would violate the free exercise of religion.

Finally, appellee believes that this case has become moot as a result of Florida's change of its statutes. Accordingly, it is not necessary for the Court to reach the constitutional issue. This case should be dismissed as moot.

ARGUMENT

I. *A Case is Mooted by Repeal of the State Statute Which is the Subject of Constitutional Attack*

In their Jurisdictional Statement, as well as in their briefs, appellants state that their constitutional claim is directed against former *Florida Statute* §192.06. (Jurisdictional Statement p. 3; Nishan Paul's Brief p. 2; Florence Diffenderfer's Brief p. 4) Appellants both state that they attack the Florida Supreme Court's interpretation of that particular statute with reference to this particular piece of property.[5]

It has been asserted throughout this case by plaintiff-appellants that a constitutional controversy was presented by the undisputed facts because the Florida Supreme Court has specifically held this property entitled to exemption under *Fla. Stats.* §192.06, notwithstanding an incidental use which produces income. The Florida statute in question

[5]*Central Baptist Church of Miami v. Dade Co., supra.*

no longer exists. There is now no relief which this court can grant — the statute can't be struck down because it no longer is in force — and thus there is no constitutional case or controversy before this Court. Appellants would have this Court invalidate §192.06, *Fla. Stats.* as applied by the Florida Supreme Court[6], but no such statute remains in the jurisprudence of Florida. Instead, there is an entirely new statutory exemption scheme which deals specifically with the aspect of this property's use of which appellants complain.

Under the new statutes, property may be exempt by reason of its *exclusive* use or its *predominant* use. [§196.012, *Fla. Stats.* (1971)]. When property is used for an exempt purpose, but not exclusively, it is exempt *only to the extent of its exempt use.* [§196.192 *Fla. Stats.* (1971)] Thus, under the new Florida exemption statutes, the Church's parking area is not necessarily exempt to the extent that it is used for non-exempt purposes.

It is not known how the County taxing authorities will apply this new statutory exemption provision to the Church's property. It is certainly possible that the taxing authority will take the position that, under the new statutes, the parking area is not exempt to the extent that it is used for rental purposes. In that event, appellants' theory before this Court would present only a hypothetical and academic issue; it would not present a genuine, present case or controversy necessary for constitutional adjudication. Lengthy argument and citation is not necessary for the proposition that when a statute under attack is re-

[6]Nishan Paul's Brief p. 2; Florence Diffenderfer's Brief p. 2-3.

pealed after the lower court's decision, no case or controversy remains for this Court to decide. *Bryan v. Austin*, 354 U.S. 933 (1957), disposing of an appeal without reviewing the lower court's decision because the state statute involved had been repealed; *Cf., Daniel v. Goliday*, 398 U.S. 73 (1970). The proposition is recognized by courts in this nation generally. 5 Am. Jur.2d 205 (App. & Error §763); *Johnson v. George*, 119 Colo. 153, 200 P.2d 931 (1948); *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 144 N.E. 579, *error dismissed* 271 U.S. 649 (1926).

Since this is not a case in which the taxing authority is attacking the exemption, there is not even remaining the issue of taxability for prior years. The County has not undertaken to tax the Church's property since the Florida Supreme Court's decision, and under Florida law the taxing authority could not attempt to back-tax the property even if this Court held that §192.06(4) was unconstitutional during its period of enactment. *Coppack v. Blount*, 145 So.2d 279 (Fla.App.3d 1962). Having once made the judgment not to tax property, the local taxing authority may not "change its mind" at a later date. See, *City of Naples v. Conboy*, 182 So.2d 412, 418 (Fla. 1965). Appellants' standing to raise this issue has been as taxpayers; their only claim for relief has been for declaration of invalidity of the now-repealed §192.06(4). There is no claim by the local taxing authorities for taxes allegedly due and owing during the existence of §192.06(4), and the local taxing authorities could not back-tax for the years of the statute's viability even if the statute were declared unconstitutional. Under Florida law, they are estopped from doing so. It follows, therefore, that this case is moot. The statute under attack has been repealed, the statute

which has taken its place is materially different; it deals directly with exempt property which is used for exempt purposes only a portion of the time. It is not known how Florida courts will apply this new statute to the subject property, certainly this case does not present any basis for judging the new statutory system. This appeal should be dismissed because the issues it presented have become moot.

II. *Appellants Have Misconceived the Constitutional Issue.*

With regard to the merits of this case, appellants rely on the No Establishment, Free Exercise and Equal Protection Clauses of the First and Fourteenth Amendments. The No Establishment Clause, however, is the heart of the appellants' case. If they cannot prevail on that issue, their attack must fail. The Free Exercise and Equal Protection claims are clearly without merit. Appellants' No Establishment attack rests on two fundamental misconceptions of American law. The first has to do with the "no aid, no hurt" doctrine of the *Everson* case and subsequent decisions by this Court. The second misconception is perhaps even more basic. It has to do with the nature of an "exemption" and its effect on the distribution of the tax burden. See Bittker, "Churches, Taxes and the Constitution," 78 *Yale Law Journal.* 1285 (1969)

As Professor Bittker shows, constitutional attacks on tax exemptions of churches rest on unarticulated and unexamined assumptions about the nature of "Exemptions" and their relationship to the tax base, allowable deductions and credits, the rates involved, and the multiplicity

of taxes. Judging by the standard of thoughtful tax analysis, Appellants' attack in this case is simplistic to the point of irrelevance. It is, however, unnecessary for the resolution of this case that the Court should become embroiled in constructing a general theory of "fair" taxation. Sticking to the facts of this case, and the only issues genuinely raised thereby, the Court can easily determine that the Appellants' No Establishment claim is without merit.

Appellants have presented this case to the Court as though it involved (1) a commercial business owned by a church but wholly distinct from the charitable and religious functions of the church and (2) a special tax exemption for such a church-owned commercial enterprise. Appellants' briefs read like attacks on former §511 of the Internal Revenue Code of 1954. Congress amended this section by the Tax Reform Act of 1969 in order to terminate the exemption of churches and certain other exempt organizations from the tax on unrelated business income.

The termination of that special exemption was requested, and fully supported, by the major religious groups in the United States. See, for example, the *Joint Statement* of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)*, before the Senate Committee on Finance, 91st Congress, 1st Sess. 83 (May 2, 1969).

The former § 511 type of exemption, however, is not involved in this case. We are not dealing with a parking area a mile away from the church, operated solely for commercial purposes, and wholly unrelated to the functions of the church except through the production of income. Neither are we dealing with an exemption like

former § 511 that was given to churches and certain other types of exempt organizations but not to exempt organizations generally. The exemption claimed by the Central Baptist Church of Miami in this case was available, before its repeal, to all "educational, literary, benevolent, fraternal, charitable and scientific institutions" in the State of Florida. *Fla. Stats.* § 192.06, as interpreted by the Supreme Court of Florida in *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (1968).

These distinctions are crucial to a proper understanding of this case. The constitutional issues involved in former § 511 are quite different from those involved in this case. For example, former § 511 involves the degree of discretion that Congress constitutionally enjoys to exempt purely commercial property from taxation. That Congress has considerable discretion in this area is not open to doubt, in view of many prior decisions of this Court; but the discretion cannot be pushed to the point of absolute arbitrariness. Moreover, former § 511, like certain other provisions of the Internal Revenue Code still in existence (notably §§ 170 and 501-3), directly involves the "destination principle" of income taxation, under which income that would otherwise be taxed is not taxed because devoted to exempt purposes. See 12 Mertens, *Law of Federal Income Taxation* §34.14. The "destination principle" is somewhat involved in the present case; but in comparison with the provisions of the Internal Revenue Code, the Florida exemption here in question is only the tail on the elephant. It would clearly be inappropriate for this Court to make a major decision, one way or the other, on the "destination principle" in this case, where neither the history nor the actual provisions of the Internal Revenue Code are directly relevant.

Finally, former § 511 was a special exemption for churches and certain other classes of exempt organizations. It was not shared by the general class of charitable nonprofit organizations, and notably not by § 501(c)(3) organizations, which include schools, colleges, hospitals and many other types of charitable nonprofit institutions. The opposition of most American churches to former § 511 was based as much on its *special* as on its *commercial* character. Church statements opposing former § 511 cannot fairly be applied to the type of property and the type of exemption involved in this case.

The "commercial enterprise" here in issue was simply the renting during weekday business hours of *part* of a church parking area that was, and is, absolutely essential to the charitable and religious functioning of the church. Spaces were rented to the public only during the periods, and only to the extent, that use of the parking area by the congregation was not necessary for church functions.

There is a shortage of parking in downtown Miami, as appellant Nishan Paul concedes (Brief on the Merits, p. 15). The Central Baptist Church made its surplus parking facilities available to the public during weekday business hours. This was a convenience for the people of downtown Miami, especially those who work at the nearby Federal courthouse and post office.

That the Church should have charged the public a rental fee for parking is hardly unreasonable. The Church, however, never operated the parking area as a real business. The Church maintained no separate income-and-expense books for the parking area. The congregation paid the expenses of maintaining the parking lot out of its general budget, and devoted the entire rental income

to the accomplishment of church purposes. In the light of these facts, the Central Baptist Church of Miami was hardly a financial tycoon, out to manipulate a tax exemption into a parking lot empire. If ecclesiastical entrepreneurs are to be found, they must be found elsewhere.

Put one way, the issue in this case might be stated as the constitutionality of the "incidental use" doctrine as applied to church property in common with the property of other charitable nonprofit organizations. Looked at another way, the issue might be stated as the constitutionality of the "destination principle" as applied to ad valorem exemptions of property producing incidental rental income for charitable nonprofit organizations, including churches.

Both of these statements of the issue, however, obscure the most fundamental constitutional question in this case: the permissibility of parity of exemption treatment for churches and other charitable nonprofit organizations. Accordingly, the constitutional question in this case is not "whether a State can exempt church-owned commercial enterprises," but whether, consistently with the First and Fourteenth Amendments, a State may:

(1) include churches on an equal footing with other charitable nonprofit organizations in the general category of tax exempt organizations?

(2) exempt from ad valorem taxes the property of charitable nonprofit organizations, including churches, that is both (a) indispensable and primarily used, throughout the week, for the accomplishment of their exempt purposes, and (b) partially used during the business week, to the extent that it is not needed for exempt purposes, for the production of income to be used for exempt purposes?

III. *The Structure of American Tax Exemptions*

Before proceeding to a direct consideration of the constitutional issues presented by this case, appellee must correct a serious misunderstanding by appellants of American tax exemptions. The gist of appellants' case is the assertion, wholly unsupported in American law, that Florida does not tax church-owned commercial enterprises, that the other 49 States and the Federal Government do, and therefore that the Florida exemption here in question is unconstitutional.

The actual fact of the matter is that every American jurisdiction permits *some* income-producing use of the "home facility" of a charitable nonprofit organization without loss of the ad valorem tax exemption. What American law, including that of Florida, has always done is to divide the property of exempt organizations (including churches) into three categories:

(1) property actually used only for exempt purposes;

(2) property not used at all for exempt purposes (other than for the production of income to be used for exempt purposes);

(3) property used primarily for exempt purposes and incidentally for the production of income to be used for exempt purposes.

The first category of property (that used only for exempt purposes) is uniformly exempt from ad valorem taxation, providing that the property is owned as well as

used by exempt organizations. 84 C.J.S. § 282(e)(1). The second category of property (that not used at all for exempt purposes, other than the production of income) is uniformly taxed in all 50 States, including Florida, and in the District of Columbia. The third category of property (primarily used for exempt purposes and incidentally used for the production of income) is neither uniformly taxed nor uniformly exempted. 34 A.L.R. 634, 659-77 (1925), 62 A.L.R. 328, 334-39 (1929), 108 A.L.R. 284, 292-97 (1937), 168 A.L.R. 1222, 1233-58 (1947); 75 ALR 2nd 1106 (1961); 33 ALR 3rd 938 (1970); 37 ALR 3rd 1191 (1971); 39 ALR 3rd 640 (1971); 84 C.J.S. §§ 282(g)(4), 291(b)(3)(a), (b), (e); Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio State Law Review* 461, 467-68, 472, 500-503, 506-7 1959); Note, "Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes," 64 *Harvard Law Review* 288, 294-99 (1950); Bennett, "Real Property Tax Exemptions of Non-Profit Organization," 16 *Cleveland Marshall Law Review* 150 (1967)

The parking area of the Central Baptist Church of Miami fits precisely into this third category of property. It is indispensable and primarily used every day and night of the week for church functions. During the weekday business hours some of the parking lot area is not necessary for church functions and is rented to the public.

Throughout our history as a nation, different States have devised different rules for determining the taxability or exemption of such property. In every State, however, and in the District of Columbia, as common knowledge and the authorities cited above demonstrate, *some* incidental income-producing use of the indispensable "home

facilities" of exempt organizations has been permitted without loss of the ad valorem exemption. Churches, schools, hospitals and orphanages, for example, do not lose their ad valorem exemptions by holding bazaars, dinners, picnics and other social functions to which the public is invited and for which a charge is made. The collection of pew-rents does not forfeit a church's or a synagogue's exemption. A church can rent its facilities for Boy Scout or other community-type meetings in many jurisdictions without losing its tax exemption. Indeed, in early New England days, the church was often known simply as the "Meeting House." Cf. Van Alstyne, *art. cit. supra*, p. 468.

Appellants seem to think that the production of income is fatal to the constitutionality of tax exemptions, at least with respect to churches. That is a fundamental misconception of what a tax exemption is all about. Exemptions are not given to organizations because they are *nonproductive;* they are given because the organizations are *nonprofit* and *charitable.* The legislature is under no obligation to tax all productive property; otherwise, the legislature could not exempt, or give other highly favorable tax treatment to, oil wells, new factories or low-income housing projects. Hospitals, schools, colleges, universities, cemeteries, museums, centers for the performing arts, cooperatives of many types, and a wide variety of other exempt organizations are allowed to charge fees for their services without loss of their tax-exempt status. 84 C.J.S. § 282(b)(4)(b). There is not, and never has been, a rule that tax-exempt organizations must derive all their income from gifts. Appellants have shown no persuasive reason, historical or otherwise, for imposing a different rule on churches than that generally applied to charitable nonprofit organizations.

Florida, therefore, so far from being the only State to allow an exemption when there has been *some* income-producing use of the indispensable "home facility" of an exempt organization, has simply followed a rule with respect to incidental rental income that is different from that followed by most other States. With the recent repeal of the 75% rule involved in this case, and the substitution of a proportional taxing schedule coupled with a minimum requirement of more than 50% use of the property for exempt purposes, Florida has now elected to join the company of those States that follow a "partial exemption" policy.

As already noted, appellants' fundamental misconception of American tax law, including that of the State of Florida, leads them to treat this case as though it involved a special exemption for church-owned commercial enterprises. If intentional, this would have been a ridiculous misstatement of the case. No special exemption for churches is involved. Churches participate in the exemption only as members of the general class of exempt organizations. No exemption of "unrelated commercial enterprises" is involved. The only property entitled to the exemption is property that is necessary and primarily used for the accomplishment of exempt purposes.

Since the Florida exemption was simply different in detail from that accorded by other States, involved no special treatment of churches, and dealt only with property necessary and primarily used for the charitable and religious functions of the church, it is difficult to see what constitutional question is involved in this case. Certainly the question that appellants seek to raise is not involved: Whether an ad valorem tax exemption can be constitu-

tionally given to a church-owned commercial enterprise, like a girdle factory, that is wholly distinct from the functions of the church except through the production of income to be used for those functions?

The real constitutional issue in this case, in appellee's judgment, is whether Florida (or any other State) can include churches in the general category of charitable nonprofit organizations and treat them, for ad valorem tax exemption purposes, the same way that it treats other nonprofit charitable organizations with respect to property that is both (1) indispensable and primarily used for exempt purposes and (2) incidentally used, to the extent compatible with the primary use for exempt purposes, for the production of income to be used for those exempt purposes.

This constitutional question is conclusively answered "Yes" by the history of our country and the decisions of this Court interpreting the No Establishment Clause.

IV. *The No Establishment Clause*

(a) *The Walz Decision.*

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court decided that churches could be given, consistently with the No Establishment Clause, the same tax relief with respect to their houses of worship that other charitable nonprofit organizations are given with respect to their basic facilities. Chief Justice Burger, speaking for an almost unanimous Court, stated:

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. . . .

. . . Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. . . . We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. (397 U.S. at 672-73)

The *Walz* decision was an authoritative construction of the No Establishment Clause, as well as of the "no aid" doctrine in *Everson v. Board of Education*, 330 U.S. 1 (1947), and the "purpose and effect" test in *Abington School District v. Schempp*, 374 U.S. 203 (1963). There is nothing in the recent *Tilton* and *Lemon-DiCenso* decisions, 403 U.S. 602, 672 (1971), that subtracts from the authority of *Walz* with respect to tax exemptions. Indeed, *Lemon-DiCenso* confirms and emphasizes the basic distinction that this Court drew in *Walz* between tax relief for churches and grants of public funds for their religious operations.

Appellants contend that the Florida exemption at issue in this case constitutes a donation by the State to the Church. The ruling in *Walz* is otherwise. Tax exemption does not mean a donation which would constitute a subsidy involving direct transfer of public monies to the subsidized enterprise and which would use resources exacted from taxpayers as a whole. As Chief Justice Burger explained for the Court:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a page of history is worth a volume of logic." (397 U.S. at 675-76)

Mr. Justice Brennan, concurring specially, agreed that there is a basic constitutional difference between exemptions and grants:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. (397 U.S. at 690)

Despite these clear pronouncements in the *Walz* decision, appellants attempt to distinguish the instant case on three grounds:

(1) *Walz* was limited to houses of worship and does not embrace other types of church property;

(2) Unlike the exemption sustained in *Walz*, the Florida exemption here in question is not part of an ancient and universal pattern in American law; and

(3) Unlike the situation in *Walz*, denial of the exemption here in question would not engender excessive entanglement of the government with church affairs.

None of these distinctions, however, is valid. *Walz* focused on property used *only* as a house of worship because, in the plaintiff's mind, this was the most objectionable subject of a tax exemption. If, however, the sanctuary can be exempted, there can be little doubt that other types of property necessary for church functions can also be exempted. If the Central Baptist Church parking lot were not rented at all, it would clearly be directly covered by *Walz* as an essential part of the house of worship.

The fact that part of the parking lot is rented part of the time does not take the area out of the *Walz* rationale. There is nothing in Chief Justice Burger's opinion for the Court that suggests that churches must be supported only by voluntary contributions. Indeed, he explicitly adverts with approval to the long-standing exemption of churches from the federal income tax:

> For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. (397 U.S. at 676)

This statement would make no sense if the Court understood *Walz* as applying only to houses of worship supported only by voluntary contributions. Such contributions are gifts and clearly excluded from "gross income" by § 102 of the Internal Revenue Code of 1954, as amended. The exemption from the federal income tax would mean nothing if it applied only to gifts.

Moreover, Chief Justice Burger cited *Gibbons v. District of Columbia*, 116 U.S. 404 (1886), *not* for the proposition that churches cannot constitutionally be given exemptions with respect to any income-producing property (a proposition that simply is not in the *Gibbons* case), but rather for the broad discretion that this Court has always recognized in the State legislatures and in Congress with respect to the taxation and exemption of property. 397 U.S. at 679-80.

In any event, the parking area involved in this case is quite different from the church property that this Court held not exempt (under the terms of the D.C. statute then in existence) in *Gibbons v. District of Columbia*. That property was separated from the church by a street, or alley, and was not purchased for, intended to be used for, or necessary for religious purposes. The property was to be rented or sold to make a profit.

The Central Baptist Church parking lot, however, is contiguous with the Church and is a necessary part of the Church and its over-all operations. The Church could not exist without the parking lot. The property was purchased for no other purpose than to meet the great need for parking spaces for Church functions. The area was *designed* for that purpose and no other from the very beginning. POAU, in its *amicus curiae* brief, maintains: "It is what they are *designed* and used for that counts" (p. 6). There was certainly no thought on the part of the Church, in purchasing any of these lots, of going into the off-street parking business.

The property was purchased and *designed* solely to provide the necessary off-street parking for the Church

and nothing else. But, as time passed and it became apparent that some of these parking spaces were not being used during the business hours six days a week, and in view of the very great need for such off-street parking for employees in the center of this great metropolitan area, the Church decided to rent the spaces it did not need during weekday business hours. The Church devoted all of the money obtained thereby to religious, educational and missionary work of the Church.

The appellants put much credence in the word "exclusively" but that word does not appear in the old Florida statute here under consideration. The New York statutes simply used the term "solely for religious worship". This, however, shows only the appellants' ignorance of what the word "exclusively" has been held to mean in such a statute. As we have already shown in Point III of this Argument (The Structure of American Tax Exemptions), every jurisdiction permits *some* income-producing use of the home facility of charitable nonprofit organizations, including churches. *Cf.* Van Alstyne, *art. cit. supra*, pp. 499-503. Florida has simply followed a different rule with respect to rental income than that adopted by most States. With the repeal of the the 75% rule, Florida is now following a policy of partial taxation and partial exemption.

(b) *Entanglement: Avoidance.*

Finally, the *Walz* case did not hold, and no other case has ever held, that the only tax exemptions in which churches may participate are those whose denial would result in an excessive entanglement of the government with

religious affairs. To the contrary, Chief Justice Burger stated for the Court that churches cannot participate in exemptions that *do* result in excessive entanglement, not that they cannot participate in exemptions that *do not* result in excessive entanglement. 397 U.S. at 674.

In her Brief on the Merits, appellant Florence Diffenderfer contends that the aid to religion that results from the Florida exemption cannot be constitutionally justified without some "paramount countervailing factor" (p. 13) or some "weighty countervailing secular interest" (pp. 17-18). There is no such doctrine in the *Walz* case or any other decision of this Court. Even if there were, the countervailing factor or interest is easy to see: the preservation of governmental neutrality toward religion, the supreme value of the No Establishment Clause.

The fundamental holding in the *Walz* case is that churches may be included in the general category of nonprofit charitable organizations and therefore may be given the same types of tax relief available to those organizations. It seems somewhat disingenuous for the appellants to assert that *Walz* speaks "only" of houses of worship, when the organization to which they belong portrayed the house of worship exemption during the *Walz* litigation as a supreme example of governmental aid to religion. One can only suppose that, should the appellants lose this case, they will say that *Diffenderfer* stands only for the exemptibility of church parking lots, not of other facilities equally indispensable for church functions.

The three-judge district court below held that, since *Walz* approved the constitutionality of exempting houses of worship in common with the basic facilities of other exempt organizations, the decision *a fortiori* approved the exemption of church parking-lots used primarily for church

functions and incidentally rented to the public (Appendix to the Jurisdictional Statement, pp. 6, 8). The District Court seemed to be saying that if government can exempt what is most sacred, it can exempt what is less sacred. After all, it is a legal commonplace that the legislature *can* exempt strictly commercial facilities of profit-making businesses. Indeed, the recent revision of the Florida Tax Exemption Laws has affected commercial and residential property far more than it has affected church property. See Montgomery, "Expanding the Rolls," Wall Street Journal, October 14, 1971, Page 1, column 6.

It is neither necessary nor appropriate, however, to read this interpretation of the District Court as a constitutional blanket for the exemption of totally unrelated business enterprises owned by churches. All that the District Court was saying is that, since a State is free to exempt a house of worship in the same way that it exempts a hospital or a university, it is also free to exempt a church parking area in the same way that it exempts a hospital or a university parking area.

What the appellants are really trying to do in this case is to resuscitate the "no aid" language of the *Everson* case, the absolutism of which was carefully qualified by this Court in *Walz*, *Tilton* and *Lemon-DiCenso*. The appellants have invited the Court to hold that the aid to religion that results from the inclusion of churches in general tax exemptions for charitable nonprofit organizations is fatal to the constitutionality of such inclusion unless (1) exclusion would result in excessive entanglement of government with religious affairs or (2) there is some other "paramount countervailing secular interest" that justifies the inclusion of churches.

The doctrine proposed by appellants is a far cry from the principles enunciated by this Court in *Walz* and recently reaffirmed in *Lemon-DiCenso*. The appellants' version of the "no aid" doctrine creates a presumption of unconstitutionality from the mere fact that a statute results in aid to religion. This converts the "no aid" doctrine into a policy of anticlericalism, of hostility to organized religion. More importantly, appellants fail to recognize that the "no aid" doctrine is only one side of the constitutional coin — the other is "no hurt." If exemption helps, taxation hurts. The appellants are caught in the dilemma of their own dialectics. See the *Sunday Closing Law Cases*, 366 U.S. 420 (1961), and the *Selective Conscientious Objector Cases*, 401 U.S. 437 (1971).

The central value of the *Walz* case is governmental neutrality towards religion, the same neutrality that Mr. Justice Clark emphasized so clearly for the Court in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). As Chief Justice Burger stated for the Court in the *Walz* case:

> The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (397 U.S. at 669)

Later in the same opinion, the Chief Justice further explained this point:

> Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against these dangers. The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself (397 U.S. at 673)

The obvious purpose of these passages was to explain the *Everson* doctrine that government cannot "aid" religion. Positive aid, by way of government expenditures necessitating regular appropriations, is one thing. Passive aid, or aid by abstention, by way of including churches in general exemptions for charitable nonprofit organizations, is quite another. The government has room for "play in the joints"; it is not forced to every exemption or to every tax.

If there was any doubt about this interpretation of *Walz*, it was removed by *Lemon-DiCenso*, where the distinction between exemptions and grants was made of governing constitutional significance. *Lemon-DiCenso* invalidated two programs of public *payments* to church-related schools and their teachers for teachers' salaries. It did not invalidate, or cast any cloud on, the traditional tax exemptions given those schools, their parking lots and other facilities.

The distinction between grants and exemptions may seem a constitutional anomaly to some. In fact, it is a typical American pragmatic compromise, based on solid practical considerations and validated by almost two centuries of experience. The governmental decision to abstain from taxation is, as Professor Freund has noted, a significant symbol that "organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, "Public Aid to Parochial Schools," 82 *Harvard Law Review* 1680, 1687 n. 16 (1969). Confronted by the "dilemma" that taxation will hurt religion, and exemption will help it, government is free to choose the course of exempting churches in common with other charitable nonprofit organizations. Churches, after all, perform many of the same functions as charitable nonprofit organizations, and should not have to restructure themselves legally in order to benefit from exemptions provided for the common good. Even in the case of the church that performs *no* secular welfare function, the government is justified, as the *Walz* case explicitly held, in abstaining from taxation as a sign and proof of the fiscal separation of church and state.

Accordingly, appellant Florence Diffenderfer's contention that *Walz* maintains the "no aid" doctrine in the tax exemption field except where taxation would result in excessive entanglement must be rejected. *Walz* rests simply on the proposition that, for the secular purpose and effect of governmental neutrality towards religion, churches may be given the same exemptions as other charitable nonprofit organizations. The fact that, as in *Walz*, the denial of an exemption *solely* to property used *only* as a house of worship would have resulted in an excessive entanglement

of the government with religious affairs is simply one aspect, not an indispensable element, of governmental neutrality.

The true thrust of the "excessive entanglement" doctrine is that churches cannot be given tax relief that results in excessive entanglement. They can be given tax relief that does *not* result in excessive entanglement, as was the case in *Walz* and is the case in the present litigation. The Florida exemption at issue in this case, far from resulting in any excessive entanglement of the State in religious affairs, actually tended to minimize the involvement of the government with church matters. It is irrelevant, therefore, that a policy of taxation rather than exemption would also not have resulted in excessive entanglement.

(c) *Entanglement: Surveillance.*

It should not be assumed too easily, however, that a policy of taxation of church parking lots such as the one involved in this case would be just as free of the dangers of excessive entanglement as a policy of exemption. Much will depend upon the way in which the statute is written. Consider, for example, the consequences of a rule that *any* or *some* "nonreligious use" of property belonging to churches means constitutional cancellation of the exemption. Such a rule would mean that the government would have to engage in continuing surveillance of all uses of church property and constantly make decisions about what is religious and what is not. Instead of the present relatively simple system, under which the government uses obvious external tests to determine whether an organization is functioning as a church or not (without minute

internal inquiry into every activity that the church is carrying on), we would have a system of constant inspection and auditing. That is forbidden by the No Establishment and Free Exercise Clauses. *Lemon-DiCenso*, 403 U.S. 602 (1971).

Certainly, in the interest of avoiding excessive entanglement with religious affairs, a government is free to abstain from any further inquiries than whether the organization is basically a church or not and whether the property in question is necessary for the achievement of its religious purposes.

This is not to say that the government *cannot* also make the opposite choice, not by way of scrutinizing church affairs closely, but by establishing certain simple rules of commercial use that result in loss of the exemption. For example, the common practice of the States supports their right to legislate that any public rental of property belonging to an exempt organization results in total or proportional loss of the exemption with respect to such property. Under such a rule, the State would not have to inquire into religious affairs, but simply into whether the property was publicly rented.

Until its recent repeal, however, of the policy, Florida chose to go the equally simple but different route of permitting exempt organizations, including churches, to keep the exemption with respect to property that was necessary and primarily used for exempt purposes, even though a part of the property was rented to the public part of the time. The secular purposes and effects of such a policy are clear: to simplify the administration of the tax laws; to encourage the productive use of property for which

there is a public demand and which might remain idle if the exemption was forfeited by partial rental; and, so far as the inclusion of churches in the policy is concerned, to guarantee governmental neutrality toward religion.

To the extent that Florida's policy was beneficial to the exempt organizations themselves, by allowing them to retain this type of rental income tax-free for the accomplishment of their exempt purposes, the policy was perfectly consistent with the Constitution. This is obviously true of exempt organizations carrying on activities that could be performed by government itself. With respect to the charitable and religious functions of churches, the policy is still unobjectionable. Benefits accruing to churches from neutral and secularly valid governmental policies do not render those policies unconstitutional. The "no aid, no hurt" doctrine of *Everson* was never meant to give the churches, or anyone else, a general veto power over otherwise secularly valid policies of the government. See the *Sunday Closing Law Cases*, 366 U.S. 420 (1961); *Selective Conscientious Objector Cases*, 401 U.S. 437 (1971).

Moreover, any aid that resulted to churches from this Florida policy was *exemption* aid, not *grant* aid. No dollar was exacted from any Florida taxpayer and put in the treasury of the Central Baptist Church. As the *Walz* case unmistakably holds, there is a vast constitutional difference, grounded in history and considerations of public policy, between an exemption and a grant of public funds. Accordingly, since the Florida exemption here in question had the requisite secular purpose and effect, and did not result in an excessive entanglement of the government with religious matters, the exemption did not violate the No Establishment Clause of the Constitution.

(d) *Entanglement: Politics.*

Towards the end of her Brief on the Merits, appellant Florence Diffenderfer states (p. 20): "There can be little doubt that these tensions and the politicization of religion are inevitable concomitants of tax exemption for church-owned commercial enterprises." Appellant, unfortunately, has totally misconceived the facts of this case, the history of the country, and the doctrine of the *Waltz* and *Lemon-DiCenso* decisions.

As appellee has repeatedly pointed out, this case does not involve the issues inherent in an "exemption for church-owned commercial enterprises" like the exemption formerly given under § 511 of the Internal Revenue Code of 1954. All that this case involves is the exemption of all charitable nonprofit organizations with respect to property that is both (a) indispensable and primarily used for exempt purposes and (b) used incidentally for income-producing purposes during the time that it is not needed for exempt purposes.

So far as the political history of tax exemptions is concerned, the words of Chief Justice Burger in his opinion for the Court in *Walz* are most apposite:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercises generally so long as none was favored over others and none suffered interference. (397 U.S. at 676-77)

If the inclusion of churches in the tax exemptions given generally to all charitable nonprofit organizations "politicizes" religion, then religion has been politicized in the United States for 200 years. As Chief Justice Burger noted for the Court in *Lemon-DiCenso*, tax exemptions given in common to all churches do not create the kind of political divisiveness that the First Amendment was intended to prevent (39 U.S. Law Week at 4850).

(e) *History: The Incidental Use Doctrine.*

Appellants vigorously urge, however, that despite the perfect fit of the Florida exemption with the *Walz* rationale, the lack of any historical pedigree for this type of exemption is fatal to its constitutionality. The other States do not do it, appellants say; therefore Florida cannot do it. Startling as this proposition is as a rule of constitutional law, the proposition is even more startling, as we have already pointed out in Point III of this Argument, in its total misunderstanding of the structure of American tax exemptions.

Every American jurisdiction has commonly and continuously allowed charitable nonprofit organizations, including churches, *some* use of their basic, necessary facilities for the production of income without loss of the exemption from ad valorem taxes. Lines, indeed, have been drawn between unrelated property and unrelated businesses on the one hand, and incidental use and traditional fund-raising activities on the other.

If a charitable nonprofit organization, whether a church or not, owns property that is physically separate from its home facility and that is used for non-exempt purposes, the exempt organization must pay the ad valorem tax on the property in every State and Territory of the

Union. If the property is part of the home facility and is necessary and actually used for exempt purposes, different States have drawn different lines in determining how much *incidental nonrelated* use of the property can be made without loss of the exemption. But in every State and in the District of Columbia, churches are permitted, in common with other charitable nonprofit organizations, to make *some* use of their necessary home facilities for various fund-raising activities that are more or less commercial in character.

Perhaps the most common examples of this, in the case of churches and synagogues are pew rents, seat payments and social affairs such as picnics, dinners, bazaars and dances. The pew rents and seat payments, indeed, are limited to members of the congregation, but the other types of activities are not. The point is that *some* income-producing use of the home facility has been allowed since time immemorial in every jurisdiction without loss of the tax exemption.

(f) *History: The "Destination Principle."*

Appellee does not believe that this is an appropriate case for testing the constitutionality of the "destination principle" in tax exemptions of charitable nonprofit organizations. That principle properly belongs in the field of *income* tax exemptions, where it finds its widest and most substantial application. See, 12 Mertens, *Law of Federal Income Taxation* §34.14. Any attempt to explore the history of this principle in the present case would take the parties and the Court far afield from the Florida exemption here in issue.

We note again, however, that Chief Justice Burger, in his opinion for the Court in the *Walz* case, mentioned

the federal income tax exemption for churches as equally acceptable with the New York ad valorem tax exemption. 397 U.S. at 676. This is fully consistent with the Court's rationale that tax exemptions do not transfer public dollars into the hands of charitable nonprofit organizations, whether churches or not.

The Florida requirement that income realized from partial rental of home facilities had to be devoted to exempt purposes created no potential for "excessive entanglement." As long as the Central Baptist Church used the income for any of its exempt purposes (charitable, benevolent, fraternal, educational or religious), the Church satisfied the statutory requirement. If the statute had required that the income be devoted to "exclusively religious" purposes, in the sense that any generally charitable use of the income would not have been sufficient, there might have been a problem of potentially excessive entanglement. The statute, however, did not do so.

Moreover, in the instant case, there was no searching scrutiny by the lower court of the activities of the Central Baptist Church. The parties stipulated that the rental income was used in accordance with the requirements of the statute. To strike the statute down on the basis of the restriction on the use of the rental income would be to substitute doubtful fears for proven facts.

Finally, regardless of the "destination principle," government must be able to exercise *some* supervision over the uses to which charitable nonprofit organizations, including churches, put their funds. There is not a shadow of evidence in the present case that the supervision by Florida has been excessive or inquisitorial.

V. The Free Exercise Clause

It is well settled that, absent the showing of a coercive effect on the appellant's exercise of his own religion, no case under the Free Exercise Clause has been established. *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968). Appellants have not shown or alleged any coercive effect of the Florida exemption on the practice of their own religion. In the *Walz* case, the plaintiff's Free Exercise claim was not even discussed by Chief Justice Burger in his opinion for the Court. Accordingly, the appellants' Free Exercise contention in the present case is frivolous. It is the No Establishment Clause, not the Free Exercise Clause, that protects citizens against governmental expenditures for religion. *Flast v. Cohen*, 392 U.S. 83, 103 (1968). There was no expenditure of public funds in the present case.

VI. The Equal Protection Clause

Appellants fare no better with their Equal Protection claim. First of all, appellants obviously lack standing to raise the Equal Protection issue. They are not commercial parking lot operators, and the equal protection of taxpayers is not violated, as innumerable decisions have held, by the granting of exemptions to nonprofit charitable organizations. The legislature does not have to tax everybody and everything. When it does impose taxes, it does not have to impose them on every taxpayer at the same flat rate. *Bell's Gap R. Co. v. Pa.*, 134 U.S. 232, 237 (1890). Only flagrantly invidious classifications in the tax laws offend the Equal Protection Clause.

If there is an equal protection issue in this case, it is on appellee's side rather than appellants'. If a State legislature systematically excluded churches from the tax relief given generally to other charitable nonprofit organizations, there would certainly be a Free Exercise issue and possibly an Equal Protection issue.

Except for *WHYY v. Borough of Glassboro*, 393 U.S. 117 (1968), appellee has not been able to find a case in the last 25 years in which this Court invalidated a State tax law on the basis of the Equal Protection Clause. Interestingly enough, the point of the *WHYY* case was that New Jersey could not *exclude* a foreign nonprofit corporation that had qualified to do business in the State from the benefits of its general ad valorem exemption for charitable nonprofit corporations.

In most of the earlier cases in which an equal protection attack was made on State tax laws or tax exemptions, the attack was unsuccessful. See, for example, the decisions cited in *The Constitution of the United States of America: Analysis and Interpretation* 1285-92 (U.S. Govt. Printing Office, 1964). The consistent doctrine of this Court has been that the Equal Protection Clause has no application to tax law except for flagrant abuses based on race, sex, or national origin, or for gross discrimination against a particular business or against foreign corporations that have been admitted to do business in a State. None of these abuses or discriminations is involved in the present case.

There can scarcely be a more reasonable basis for difference in tax treatment than the distinction between charitable nonprofit organizations and commercial organizations operated for profit. Florida has treated all nonprofit charitable organizations, including churches, alike. There is no Equal Protection issue.

CONCLUSION

Appellants' claims are based on a misunderstanding of the facts and of the law. They also seem to be based on hostility towards what the appellants regard as the "wealth of the churches." The POAU *amicus* brief alleges that many churches of late have branched out into the business world and own real property for income purposes (p. 14). That may be true. We are not dealing, however, with "many churches," but only with the Central Baptist Church of Miami. Such general and unsubstantiated allegations are characteristic of the entire POAU brief. It was predicated upon supposed facts wholly different from those actually involved in this case.

Many court opinions — 28 in all — are cited in appellants' briefs, but not one holding that a tax exemption of church-owned property constitutes an establishment of religion or prohibits the free exercise thereof. The reason is obvious. *Walz v. Tax Commission* settled that question. Although every State has a tax exemption statute, no court, federal or state, has ever declared a tax exemption for churches unconstitutional. In their desperation, appellants even dig up the ancient mortmain statutes, which, of course, have not the slightest bearing on this case.

Apparently, appellants are attempting, with all these citations and quotes, to assist this Court in maintaining its balance while traversing the "tight rope" mentioned by Chief Justice Burger in his opinion for the Court in *Walz*. 397 U.S. at 672. The facts and the law, however, are both so clear in this case that we submit that the Court will not have to walk a tight rope in finding that the exemption here involved does not constitute an establishment, nor prohibit the free exercise, of religion. The Court can proceed down the broad highway of facts and law without fear of losing its balance.

Since appellants have failed to sustain their contention that the Florida exemption here in question violates the No Establishment, Free Exercise, or Equal Protection Clause of the Constitution, appellee Central Baptist Church of Miami respectfully prays this Court to affirm the judgment of the court below. If, however, this Court agrees with appellee that this case has become moot as a result of action by the Florida legislature, in repealing the statute under attack, appellee requests this Court to dismiss this appeal as moot.

Respectfully submitted,

Herbert S. Sawyer
Karl B. Block, Jr.
1600 First National Bank Bldg.
Miami, Florida 33131

Charles M. Whelan
106 West 56 St.
New York, N.Y. 10019

William R. Consedine
1312 Massachusetts Ave.
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Counsel for Appellee,
Central Baptist Church of Miami

By _____
Herbert S. Sawyer

Mershon, Sawyer, Johnston,
Dunwody & Cole
1600 First National Bank Bldg.
Miami, Florida 33131
Of Counsel for Appellee,
Central Baptist Church of Miami

PROOF OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief and Appendix of Appellee, Central Baptist Church of Miami were served by mail this 19th day of October, 1971 to: HOWARD J. HOLLANDER, ESQ., BERNARD C. PESTCOE, ESQ., RICHARD FEDER, ESQ., and LEO PFEFFER, ESQ., Attorneys for Appellants, c/o American Civil Liberties Union, 708 City National Bank Building, Miami, Florida 33130; and STUART SIMON, ESQ., Attention ST. JULIEN P. ROSEMOND, ESQ., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, by depositing the same in a United States post office, or mail box, with first-class postage prepaid addressed to counsel of record at his post office address.

Of Counsel

APPELLEE'S APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY

No. 66C11592 — Herin

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED,
a non-profit Florida corporation,

Plaintiff,

vs.

DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, as County Manager of Metropolitan Dade County; R. K. OVERSTREET, as Tax Collector of Metropolitan Dade County; and FRED O. DICKINSON, JR. as Comptroller of the State of Florida,

Defendants.

AFFIDAVIT of MILLER WALTON, Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated, in support of plaintiff's motion for summary final decree.

State of Florida)
) SS.
County of Dade)

Personally appeared before me a Notary Public in and for the State of Florida at Large, MILLER WALTON, who, being duly sworn, says:

I am, and have been continuously at all times since February 11, 1953, Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated (referred to hereinafter as the "Church"), and was a member of the Committee during by far the greater part of the time from September 24, 1947, until I became Chairman. I also am, and have been continuously at all times since September 24, 1947, a Deacon in the Church. From the performance of my duties in those capacities, as well as from having been a member of the Church continuously at all times since May 1, 1938, I know the matters and things alleged in the complaint, as amended, and those set out hereinafter in this affidavit.

I have read the complaint, as amended. All of the matters and things alleged therein are true, with two exceptions. The first is that in the real property descriptions the terms "NORTH DADE" and "NORTH MIAMI" were intended to be and should have been "MIAMI NORTH."

The second exception is that in paragraph XIII the allegation that when the Church was incorporated it owned Lots 18, 19 and 20 and the south 100′ of Lots 1 and 2, is erroneous. As set out more fully hereinafter in this affidavit, the facts are that when the Church was incorporated it did not own any of those properties, and after its incorporation the Church first became the owner of Lots 18, 19 and 20, and later became the owner of the south 100′ of Lots 1 and 2.

The Church was incorporated on June 29, 1936, as a non-profit corporation. A true copy of the Corporate Charter of the Church and a true copy of the only amendments thereto are attached to this affidavit and by reference made a part hereof as composite Exhibit 1.

The purposes and objects of the Church are set forth in Article II of the Charter as follows:

> "The general purposes and objects of this corporation shall be to conduct for religious worship and instruction churches, schools, parsonages, and other institutions connected therewith of a religious, educational, charitable and benevolent character to the end that its own members and others may be generally instructed and guided concerning those articles of faith which are most surely held among Southern Missionary Baptist Churches and to advance spiritual growth and enlightment, moral and personal purity among its own membership and the people of the community in which it is located; to promote home and foreign misions; and to aid in the spread of the Gospel of Jesus Christ to the ends of the earth; also to educate, prepare, and ordain Christian men and women for the ministry of the Gospel of Jesus Christ; and for the purpose of promoting the foregoing objects, this corporation shall have the right to acquire, either by gift or purchase, and to hold, own, sell, mortgage, or encumber in any manner, lease and improve real estate and personal property for itself and others, either as trustee or otherwise."

The Church was re-incorporated as a non-profit corporation under Chapter 617, Florida Statutes, on March 3, 1967, by an Amended Certificate of Incorporation, a true copy of which is attached to this affidavit and by reference made a part hereof as Exhibit 2.

The purposes and objects of the Church are set forth in Article II of the Amended Certificate of Incorporation as follows:

> "The general purposes and objects of this corporation shall be to conduct for religious worship and instruction, churches, schools, parsonages, and other institutions connected therewith of a religious, educational, charitable and benevolent character to the end that its own members and others may be generally instructed and guided concerning those New Testament doctrines which are most surely held among Southern Missionary Baptist Churches and to advance spiritual growth and enlightment, moral and personal purity among its own membership and the people of the community in which it is located; to promote home and foreign missions; and to aid in the spread of the Gospel of Jesus Christ to the ends of the earth; also to educate, prepare and ordain Christian men and women for the ministry of the Gospel of Jesus Christ; and for the purpose of promoting the foregoing objects, this corporation shall have the right to acquire, either by gift or purchase, and to hold, own, sell, mortgage, or encumber in any manner, lease and improve real estate and personal property for itself and others, either as trustees or otherwise."

Each and every and all of the exhibits attached to the complaint, being Exhibits A, B, C, D and E, is a true and correct copy of the original thereof, and each of said exhibits is by reference made a part of this affidavit.

In addition, there is attached hereto as Exhibit 3, and made a part hereof by reference, a true and correct copy of the Church's monthly operating report for December 1966. As shown by this exhibit in the tabulation at the bottom of the last page, Budget Receipts of the Church in the year 1966 amounted to $293,102.22, and as shown in the third page of the exhibit, this amount of Budget Receipts, together with a balance of $975.04 on hand on January 1, 1966, or a total amount of $294,077.26, was disbursed by the Church in 1966 in strict compliance with the provisions of its 1966 Budget attached to the complaint as Exhibit "C".

The Church's Sanctuary, together with its Sunday School Education Building, a downtown "come-as-you-are" Mission which the Church maintains for less fortunate and destitute persons sojourning in or nearby the immediate area, and the Church's off-street parking areas described in the complaint, as amended, are located in the downtown business section of the City of Miami, in the city block bounded on the north by N.E. Sixth Street, on the east by N.E. First Avenue, on the south by N.E. Fifth Street, and on the west by North Miami Avenue. This block was platted as Block 63 MIAMI NORTH, by plat dated June 9, 1896, filed in the Dade County Public Records on August 8, 1896, by Mary Brickell, Wm. B. Brickell, Julia D. Tuttle and Fort Dallas Land Company.

This city block is, and has been increasingly for many years, surrounded by business establishments and commercial enterprises which extend over large areas in all directions, and there are not and have not been in recent years any substantial residential areas in the

vicinity. The Church is not a local, community oriented Church (in the sense of one having a surrounding residential area or relatively nearby residential areas). Due to its location in the downtown business section of a large city, the Church unavoidably has evolved over the years into a metropolitan downtown Church attended by members and others who must travel substantial distances to attend services and other functions of and meetings at the Church.

Affiant's home is located approximately five miles southwest of the Church. Very few, if any, members or others who attend services and other functions of and meetings at the Church, reside appreciably closer to it. The vast majority reside from five to fifteen miles north, east, south or west of the Church. Public transportation is utterly inadequate as a means for them to travel to or from the Church. They can travel to or from it only in private automobiles. When they are at the Church they must have some place to park their automobiles, otherwise they cannot attend.

The few and constantly decreasing on-street parking spaces on the surrounding paved streets, on some of which streets parking is prohibited at all times, are grossly insufficient in number for parking even a small fraction of the number of automobiles for which parking area must be available during services and other functions of and meetings at the Church. The inescapable fact is that if the Church had not provided its present off-street parking area it would have withered and died, as many downtown Churches lacking sufficient parking area have done in other cities.

The Church's off-street parking area was acquired and is used and provided by the Church as an off-street area in which members and others attending, among others, the following services and functions of and meetings at the Church, may park, without charge of any kind, the automobiles in which they have traveled to the Church:

(i) Members and others attending Sunday School on Sundays.

(ii) Members and others attending the Morning Worship Service on Sundays.

(iii) Members and others using the Church Library on Sundays.

(iv) Members and others attending practice of the Bell Choir in the afternoon of many Sundays.

(v) Members and others attending practice of the Concord Choir in the afternoon of many Sundays.

(vi) Members and others attending practice of the Chapel Choir in the afternoon of many Sundays.

(vii) Members and others attending the Training Union Fellowship in the late afternoon of Sundays.

(viii) Members and others attending the Training Union in the early evening of Sundays.

(ix) Members and others attending the Evening Worship Service on Sundays.

(x) Members of the Executive Board of the Miami Baptist Association, which has more than 200 members, attending on at least 12 Mondays in every year meetings which begin in the morning and continue through lunch and into the afternoon.

(xi) Members and others attending in the late afternoon of at least 12 Mondays in every year meetings of the Church's Men's Brotherhood.

(xii) Deacons in the Church meeting in the evening of at least 12 Mondays in every year.

(xiii) Members and others attending practices of the Children's Choirs in the afternoon of many Wednesdays in the year.

(xiv) Members and others using the Church library in the afternoon of every Wednesday in the year.

(xv) Members and others attending practice of the Bell Choir in the afternoon of many Wednesdays in the year.

(xvi) Members and others attending the Family Supper in the late afternoon of every Wednesday in the year.

(xvii) Members and others attending Officers and Teachers meetings, Departmental meetings and numerous other meetings in the early evening of every Wednesday in the year.

(xviii) Members of and the clerical assistant to the Finance Committee of the Church in attendance at meetings in the evening of every Wednesday in the year.

(xix) Members and others attending Prayer Meeting in the evening of every Wednesday in the year.

(xx) Members and others attending practice of the Sanctuary Choir, having over 100 members, in the evening of substantially every Thursday in the year.

(xxi) Members and others attending meetings of the Women's Missionary Society in the morning of at least 12 Fridays in the year.

(xxii) Those in attendance on week days at monthly day time meetings of the Ministers' Conference of the Miami Baptist Association.

(xxiii) Those in attendance on week days at monthly day time meetings of the Miami Council of Churches.

(xxiv) Those in attendance on week days at monthly day time meetings of members of the Parents Teachers Association.

(xxv) Those in attendance at any wedding held at the Church.

(xxvi) Those in attendance at any funderal service conducted at the Church.

(xxvii) Numerous other morning, afternoon and evening week day Church, denominational, religious, educational, literary, benevolent, fraternal and charitable gatherings, meetings, activities and programs.

The Church never has made, and does not make, any charge of any kind for any of its off-street parking spaces used at any time for any purpose stated in any of the foregoing paragraphs numbered (i) to (xxvii), inclusive, and has made, and now makes, charges only on week days (Monday through Saturday) for such of its off-street parking spaces as are not in use for any of those purposes.

When the Church was incorporated on June 29, 1936, it did not own any of the real property described in the complaint, as amended, but was occupying and using, and thereafter continued to occupy and use, the Church Sanctuary, which was then and still is situate on Lots 18, 19 and 20, shown on Exhibit A to the complaint.

The Church thereafter purchased and became the owner of Lots 18, 19 and 20 on January 4, 1937. A true

copy of the deed of conveyance to the Church is attached hereto as Exhibit 4 and made a part hereof by reference.

At, and before, and after, the date on which the Church was incorporated, the south 100' of Lots 1 and 2, shown on Exhibit A to the complaint, which south 100' is contiguous to Lots 19 and 20, was not owned by the Church but was vacant and unimproved, and was available for use and was used as off-street parking area for the automobiles of members and others attending services and functions of and meetings at the Church.

The Church purchased and became the owner of the south 100' of Lots 1 and 2, on December 22, 1943. A true copy of the deed of conveyance to the Church is attached hereto as Exhibit 5 and made a part hereof by reference.

The number of automobiles used in the period of 1936-1939, by members and others for transportation to and from services and functions of and meetings at the Church was far less than the number so used in recent years. However, even with the relatively small number of automobiles so used in those earlier years, it soon developed that the off-street parking afforded by the south 100' of Lots 1 and 2, together with the limited on-street parking in the vicinity of the Church, was inadequate to provide parking for that relatively small number of automobiles, and that, for the Church to survive, it imperatively was necessary for the Church to provide additional off-street parking area for automobiles so used.

In recognition of this imperative need, and to assure survival of the Church, members of the Congregation purchased, and on January 16, 1940, donated to the

Church, Lots 6 and 7 for use by the Church as off-street parking area for automobiles of members and others attending services and functions of and meetings of the Church, and Lots 6 and 7 have been at all times since, and are now, used by the Church for that purpose. A true copy of the deed conveying Lots 6 and 7 to the Church is attached hereto as Exhibit 6 and made a part hereof by reference.

During World War II, few, if any, automobiles were manufactured except for military uses. Automobiles could not be purchased by individuals and families for private use, and gasoline was rationed. Due to those conditions the need of the Church to provide additional off-street parking area for the automobiles of members and others attending services and functions of and meetings at the Church did not increase appreciably until the years following the end of World War II, when gasoline rationing was terminated and automobiles again were manufactured for sale and were sold to the public.

On April 15, 1948, the Church purchased and became the owner of Lot 3. A true copy of the deed conveying Lot 3 to the Church is attached hereto as Exhibit 7 and made a part hereof by reference.

The Church thereafter constructed its Sunday School Educational Building on the south 100' of Lots 1, 2 and 3, with the result that the south 100' of Lots 1 and 2, which theretofore had been available for use and had been used for off-street parking of the automobiles of members and others attending services and functions of and meetings at the Church, no longer was available for and could not be used for that purpose.

In the period of 1947-1950 the number of automobiles used by individuals and families to attend services and functions of and meetings at the Church continually increased materially. The exact extent of the increase is not known. Affiant estimates that by the early part of 1950, the number of automobiles so used was at least five times greater than the number so used in the period of 1936-1939. In early 1950, however, Lots 6 and 7 comprised the only off-street parking area owned by the Church for parking automobiles so used, and that off-street parking area, together with the limited and ever decreasing on-street parking area in the vicinity of the Church, had become and was grossly inadequate for parking automobiles of members and others attending services and functions of and meetings at the Church, and it had become and imperatively was necessary, if the Church was to survive, for the Church to enlarge its off-street parking area to the greatest extent possible and as rapidly as possible.

By reason of this imperative necessity, and to assure the survival of the Church, and solely for the purpose of providing for off-street parking of automobiles of members and others attending services and functions of and meetings of the Church, the Church's off-street parking area, consisting at that time of only Lots 6 and 7, thereafter was enlarged as follows:

On December 8, 1950, the Church acquired and added Lot 14 to its off-street parking area.

On November 7, 1951, the Church acquired and added Lot 17 to its off-street parking area.

On April 11, 1952, the Church acquired Lot 16 and demolished a residential building thereon and added the lot to its off-street parking area.

On April 14, 1952, the Church acquired and added to its off-street parking area the north 105' of Lot 15.

On January 29, 1954, the Church acquired and added to its off-street parking area the south 75' of Lot 13.

On December 9, 1954, the Church acquired and added to its off-street parking area the south 45' of Lot 15.

On December 31, 1956, the Church acquired the north 50' of Lots 1 and 2 and demolished a commercial building thereon and added this property to its off-street parking area.

On October 7, 1959, the Church acquired Lots 8, 9 and 10 and the north 75' of each of Lots 11, 12 and 13 and demolished a group of commercial buildings thereon and added more properties, except the north 50' of Lots 9 and 10, to its off-street parking area.

A true copy of each of the deeds conveying to the Church the respective properties described in the immediately preceding eight paragraphs hereof is attached hereto as composite Exhibit 8 and made a part hereof by reference.

The increase since 1950 in the number of automobiles used by individuals and families in attending services and functions of and meetings at the Church has been so great that the automobiles so used cannot be accommodated in the 290 spaces in the Church's off-street parking area. To accommodate and make provision for parking the large number of automobiles in excess of 290, used by members and others on Sundays to attend services and functions of and meetings at the Church, a commercial parking lot (not owned or operated by the Church), located on Northeast 5th Street, across that street from the Church, is leased by the Church on Sundays for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

The Church also has arranged for the use on Sundays of another commercial parking lot (not owned or operated by the Church), located on Northeast 6th Street, across that street from the Church's off-street parking area, for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

In addition, the Church has arranged with a number of business establishments and commercial enterprises in the general vicinity of the Church for off-street parking lots and areas maintained by such establishments and enterprises to be used on Sundays, for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

The auditorium of the Church has a seating capacity of approximately 2200. If the congregation should attempt, at this time, to build the Church Sanctuary on

any other property in the City of Miami, except within the C-3 (Central Commercial) District, Ordinance No. 6871 of the City would require the congregation to provide for such new Church one off-street parking space for each five seats in the auditorium, or a total of approximately 440 off-street parking spaces. The requirement in the unincorporated area of the county is one parking space for each four seats in a church auditorium, Code of Metropolitan Dade County, §33-124(d). This would mean, were the Church in an unincorporated portion of the county, it would be required to have 550 off-street parking spaces.

The area of the off-street parking spaces for which the Church makes charges on week days is less than 75% of the total area of the real property owned by the Church in the city block, and is an integral and functional and physical part thereof, and is an indispensable and essential Church property used by the Church solely and exclusively in furtherance of the religious, educational, literary, benevolent, fraternal and charitable purposes and objects of the Church set out in its original Charter and in its Amended Certificate of Incorporation.

Affiant further says that every dollar of income realized by the Church as the proceeds of charges made by the Church for the use of any of its off-street parking spaces is appropriated by the budget of the Church, and is used by the Church each month, exclusively for the Church's World Missions and Educational Program. None of this income is used for any other purpose, directly or indirectly. None of the expenses of operating the Church's off-street parking area are paid by or from any portion of any charges made by the Church for the use of any of its off-street parking spaces.

The Church's World Missions and Educational Program is exclusively a religious, educational, literary, benevolent, fraternal and charitable program. The moneys appropriated and disbursed for the program, including but not limited to the entire proceeds of all charges made by the Church for the use of any of its off-street parking spaces, are disbursed to or for the benefit of the following persons, organizations and institutions or in the furtherance of the following purposes and beneficences:

a. Cooperative Program of Southern Baptist Convention

b. Miami Baptist Association

c. American Bible Society

d. Baptist Bible Institute

e. Fay Taylor Salary (Missionary)

f. Terry and Wilma Thorpe Salaries (Missionaries)

g. Religious Broadcasting

h. Local Missions

i. Protestants and Other Americans United

j. United Christian Action

k. Miami Council of Churches

l. Stetson University

m. Ministerial Retirement

n. Spanish Mission

As shown on page 3 of Exhibit 3 hereto, such disbursements amounted in 1966 to $67,413.61. This amount included, in addition to other funds, the entire proceeds

of all charges made by the Church in 1966 for the use of any of its off-street parking spaces. The disbursements were as follows:

a.	Cooperative Program of Southern Baptist Convention	$18,632.49
b.	Miami Baptist Association	8,000.00
c.	American Bible Society	100.00
d.	Baptist Bible Institute	200.00
e.	Fay Taylor Salary (Missionary)	2,000.00
f.	Terry and Wilma Thorp Salaries (Missionaries)	2,000.00
g.	Religious Broadcasting	7,633.00
h.	Local Missions	21,300.00
i.	Protestants and Other Americans United	100.00
j.	United Christian Action	100.00
k.	Miami Council of Churches	1,200.00
l.	Stetson University	4,400.00
m.	Ministerial Retirement	1,320.12
n.	Spanish Mission	428.00
	Total	$67,413.61

Defendants intend to collect the ad valorem taxes which are the subject of this action. The collection of such taxes from the Church will proximately cause and result in immediate and irreparable harm and damage,

because the Church's budget expenditures in 1966 for religious, educational, literary, benevolent, fraternal and charitable purposes, would have been, and its budget expenditures for those purposes in 1967 will be severely curtailed and the humanitarian causes served thereby harmfully jeopardized and impaired.

As shown by the tabulation at the bottom of the last page of Exhibit 3 hereto, the Church's budget receipts in 1966, including but not limited to the entire proceeds of all charges made by the Church for the use of any of its off-street parking spaces, amounted to $293,102.22. This amount was $34,973.58 less than the $328,076 total of the Church's 1966 budget.

As a result of this budget deficit, the Church was unable to and did not pay in full its 1966 World Missions and Educational Program budget appropriation in the amount of $25,575 for the Cooperative Program of the Southern Baptist Convention, and was able to and did pay only $18,632.49 of that budget appropriation, and, as set forth by the tabulation at the top of the first page of Exhibit 3 hereto, the Church also was unable to and did not pay other 1966 budget appropriations totaling $11,841.01.

If the ad valorem taxes which are the subject of this suit had been collected, the amount thereof could not have been used to defray budget appropriations, and such deficits in the payment of budget appropriations would have been increased by that amount.

Moreover, by operation of law, this tax claim, if not paid, will constitute a cloud on and wrongfully impair

the Church's title to its off-street parking area. All of the foregoing immediate and irreparable damage and harm to the Church is without adequate remedy at law, because it cannot be remedied or compensated by a money judgment.

s/ Miller Walton

Miller Walton

Before me this day personally appeared MILLER WALTON to me well known and known to me to be the person described in and who executed the foregoing instrument, who is to me well known and being sworn deposes and says that he is the Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated, Miami, Florida, and that he has read the foregoing affidavit and is acquainted with the facts therein set forth and the same are true.

s/ Miller Walton

Miller Walton

Sworn to and subscribed before
me this 27 day of April 1967.

s/ Elizabeth A. Smith

Notary Public
State of Florida at Large
My commission expires:
April 8, 1969

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing affidavit was served by mail upon Thomas C. Britton, Esquire, Dade County Attorney and Attorney for the Defendants, 1626 Dade County Courthouse, Miami, Florida 33130, Attention Stuart L. Simon, Esquire, this 28th day of April, 1967.

HERBERT S. SAWYER

Of Counsel

70-47

Supreme Court, U.S.
FILED
OCT 21 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. [redacted] 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a nonprofit Florida Corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SUGGESTION BY THE ATTORNEY GENERAL, STATE OF FLORIDA, FOR JUDICIAL NOTICE

ROBERT L. SHEVIN
ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1,042

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a nonprofit Florida Corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SUGGESTION BY THE ATTORNEY GENERAL, STATE OF FLORIDA, FOR JUDICIAL NOTICE

The undersigned, as Attorney General for the State of Florida, respectfully suggests to the Court that it may take judicial notice of Chapter 71-133, Laws of Florida, General Acts of 1971, attached as Exhibit "A" to this Suggestion, as a revision and recodification of the property tax exemption laws of Florida. Section 15 of Chapter 71-133 repeals the statute in controversy in the case now before the Court, former Section 192.06, Florida Statutes 1967, renumbered Section 196.191, Florida Statutes 1969, by Chapter 69-55, Laws of Florida, General Acts of 1969.

Sections 1, 3 and 5 of Chapter 71-133, Laws of Florida, pages 1, 4 and 5 of Exhibit "A" attached hereto, substitute the following new provisions of law to governing all future tax exemptions in the factual situation before the court in this case:

> "196.012 Definitions.--For the purpose of this chapter the following terms are defined as follows except where the context clearly indicates otherwise:
>
> "(1) Exempt use of property means predominant or exclusive use of property for educational, literary, scientific, religious, charitable or governmental use as defined in this act.
>
> "(2) Exclusive use of property means property that is used one hundred percent (100%) for exempt purposes. Such purposes may include more than one class of exempt use.

"(3) Predominant use of property means property used for exempt purposes in excess of fifty percent (50%) but less than exclusive."

"196.192 Exemptions from ad valorem taxation.--

"(1) All property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

"(2) All property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the non-exempt use."

"196.193 Exemption applications; review by the assessor.--

"(1)(a) All property exempted from the annual application requirement of §196.011, Florida Statutes, shall be returned, but shall be granted tax exemption by the tax assessor; provided that no such property shall be exempt which is rented or hired out for other than religious or educational or other exempt purposes at any time.

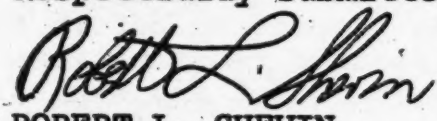
"(b) The tax assessor may deny exemption to property claimed by religious organizations to be used for any of the purposes set out in §196.011, Florida Statutes, if the use is not clear or if the tax assessor determines that the property is being held for speculative purposes or that it is being rented or hired out for other than religious or educational purposes."

The existence and effect of the repealer above noted, together with the revised provisions of the exemption statutes, would appear to be a proper subject for judicial notice in the context of the proceeding before the Court. These legislative redefinitions of standards of predominant and exclusive use would, in the case of future exemptions, clearly alter and supersede the Florida statutory and decisional law which the Court in this case is called upon to invalidate under constitutional doctrines, and would accordingly render a decision substantially inapplicable to the future administration of Florida law in this area. Cf. Bryan v. Austin (1957), 354 US 933, 1 L ed 2d 1527, 77 S Ct 1396; 5 Am. Jur. 2d 205, App. & Error Sec. 763. Further, because of the facts presented in this case involving affirmative action in favor of exemption for the taxpayer as to taxes for the current and previous years, a decision by the Court may be without practical effect because of the inapplicability of back-assessment procedures under Florida statutes governing back-assessments, construed by the Florida Supreme Court to be inapplicable because of estoppel in such circumstances. City of Naples v. Conboy, Fla. 1966, 182 So.2d 412, cases cited at page 418.

The foregoing summary and attached exhibit is therefore presented to facilitate

the Court's consideration and disposition of the issues.

Respectfully submitted,



ROBERT L. SHEVIN
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32304

PROOF OF SERVICE

I, Winifred L. Wentworth, Assistant Attorney General of the State of Florida, hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that on the 20th day of October, 1971, I served copies of the foregoing Suggestion by the Attorney General, State of Florida, For Judicial Notice, on each of the parties by depositing such copies in a United States Post Office, addressed as follows: HERBERT J. SAWYER, ESQ., c/o MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE, Attorneys for Appellee Central Baptist Church of Miami, Florida, Incorporated, 1600 First National Bank Building, Miami, Florida 33131; HOWARD J. HOLLANDER, ESQ., BERNARD C. PESTCOE, ESQ., and RICHARD FEDER, ESQ., Attorneys for Appellants, c/o American Civil Liberties Union, 708 City National Bank Building, Miami, Florida 33130; and THOMAS C. BRITTON, ESQ., Attention ST. JULIEN P. ROSEMOND, ESQ., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130.

ROBERT L. SHEVIN
ATTORNEY GENERAL

Winifred L. Wentworth
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

EXHIBIT "A"

CHAPTER 71-133

Senate Committee Substitute for House Bill No. 753

AN ACT relating to ad valorem taxation and exemptions therefrom; amending chapter 196, Florida Statutes, by adding new sections, by amending section 196.011, Florida Statutes, and by repealing sections 196.191, 196.201, 196.211, 196.22, 196.25, 196.275 and 196.30, Florida Statutes; repealing all exemptions granted by special or local acts or general acts of local application; providing definitions; establishing procedures and criteria for granting exemptions; providing for the approval of exemptions by tax assessors and the review of determinations by the boards of tax adjustment; providing for the exemption of certain property used exclusively or predominantly for literary, scientific, religious, educational, and governmental purposes; excluding certain leasehold interests from exemption; providing an exemption for property owned by widows, totally and permanently disabled persons, and blind persons; amending chapter 192 by providing for the taxation of nonexempt properties; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.012 Definitions.—For the purpose of this chapter the following terms are defined as follows except where the context clearly indicates otherwise:

(1) Exempt use of property means predominant or exclusive use of property for educational, literary, scientific, religious, charitable or governmental use as defined in this act.

(2) Exclusive use of property means property that is used one hundred percent (100%) for exempt purposes. Such purposes may include more than one class of exempt use.

(3) Predominant use of property means property used for exempt purposes in excess of fifty percent (50%) but less than exclusive.

(4) Educational institutions means state, parochial, church, and private schools, colleges and universities conducting regular classes and courses of study required for eligibility to certifica-

CODING: Words in ~~struck through~~ type are deletions from existing law; words in *italics* are additions.

tion by, accreditation to, or membership in the state department of education of Florida, southern association of colleges and secondary schools or the Florida council of independent schools.

(5) Governmental, municipal or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States, the State of Florida or any of its political subdivisions, or any municipality, agency, authority or other public body corporate of the state is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. The term "governmental purpose" shall include a direct use of property on federal lands in connection with the federal government's space exploration program. Real property and tangible personal property owned by the federal government and used for defense and space exploration purposes or which is put to a use in support thereof shall be deemed to perform an essential national governmental purpose and shall be exempt.

(6) Charitable purpose means a function or service which is of such a community service that its discontinuance could result in the allocation of public funds for the continuance of the function or service.

(7) Hospitals means institutions which possess a valid license granted under chapter 395, Florida Statutes, on January 1 of the year for which exemption from ad valorem taxation is requested.

(8) Nursing homes, homes for special services and homes for the aged mean institutions which possess a valid license under chapter 400, Florida Statutes, on January 1 of the year for which exemption from ad valorem taxation is requested.

(9) Gross income means all income from whatever source derived including but not limited to the following items, whether actually owned by, or received by, or not received by but available to any person or couple; earned income, income from investments, gains derived from dealings in property, interest, rents, royalties, dividends, annuities, income from retirement plans, pensions, trusts, estates and inheritances, direct and indirect gifts, social security benefits, public assistance payments pay-

able to the person or assigned to an organization designated specifically for the support or benefit of that person. Gross income specifically shall not include payments made for the medical care of the individual or return of principal on the sale of a home.

(10) Totally and permanently disabled persons means those persons who are currently certified by the Florida department of health and rehabilitative services or the federal social security administration or veterans' administration to be totally and permanently disabled.

(11) Couple means a husband and wife legally married under the laws of any state or territorial possession of the United States of America, or of any foreign country.

Section 2. Section 196.081, Florida Statutes, is amended to read:

196.081 Exemption for *certain permanently and totally* disabled veterans ~~known as paraplegics.~~—

(1) Any real estate used and owned as a homestead by an ex-serviceman, honorably discharged with service connected *total and permanent* disability and who has a ~~certificate~~ *letter* from the *United States* government or United States veterans' administration, or its successors, certifying that the ex-serviceman is ~~receiving or has received special pecuniary assistance due to disability requiring specially adapted housing and classed as a paraplegic.~~ *totally and permanently disabled due to total blindness, or from the amputation of both arms or both legs, or both hands or both feet, or the combination of a hand and a foot, or from paraplegia, osteochondritis resulting in permanent loss of the use of both legs, or permanent paralysis of both legs and lower parts of the body, or from hemiplegia, or has permanent paralysis of one leg and one arm on either side of the body, resulting from injury to the spinal cord, skeletal structure, or brain, or from disease of the spinal cord not resulting from any form of syphilis,* shall be exempt from taxation.

(2) The production by an ex-serviceman of a ~~certificate~~ *letter* of *total and permanent* disability from the United States government or United States veterans' administration before the tax assessor of the county wherein ~~his~~ *said ex-serviceman's* property lies, shall be prima facie evidence of the fact that he is entitled to such ~~exemptions~~ *exemption.*

(3) In the event the homestead of *the totally and permanently disabled* veteran ~~paraplegic was or~~ is held with the veteran's wife as an estate by the entirety, and in the event the veteran ~~did or shall predecease~~ *predeceases* his wife, the exemption from taxation shall carry over to the benefit of the veteran's wife, provided, however, that she ~~continue~~ *continues* to reside on said real estate and use it as her domicile or until such time as she ~~shall remarry~~ *remarries* or sells or otherwise disposes of the property.

Section 3. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.192 Exemptions from ad valorem taxation.—

(1) All property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

(2) All property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the non-exempt use.

Section 4. Section 196.011, Florida Statutes, is amended to read:

196.011 Annual application required for exemption.—Every person or organization who has the legal title to real or personal property which is entitled by law to exemption from taxation as a result of its ownership and use, ~~except property owned and used exclusively for governmental purposes or religious purposes,~~ shall before April 1 of each year file an application for exemption with the county tax assessor listing and describing the property for which exemption is claimed and certifying its ownership and use. The department of revenue shall prescribe the forms upon which the application is made. *It shall not be necessary to make annual application for exemption on houses of public worship, the lots on which they are located, personal property located therein or thereon, every parsonage, house of public worship owned burial grounds and tombs, and other such property not rented or hired out for other than religious or educational purposes at any time. Failure to make application, where required by April 1 of any year, shall constitute a waiver of the exemption privilege for that year.*

Section 5. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.193 Exemption applications; review by the assessor.—

(1)(a) All property exempted from the annual application requirement of §196.011, Florida Statutes, shall be returned, but shall be granted tax exemption by the tax assessor; provided that no such property shall be exempt which is rented or hired out for other than religious or educational or other exempt purposes at any time.

(b) The tax assessor may deny exemption to property claimed by religious organizations to be used for any of the purposes set out in §196.011, Florida Statutes, if the use is not clear or if the tax assessor determines that the property is being held for speculative purposes or that it is being rented or hired out for other than religious or educational purposes.

(c) If the tax assessor does deny such property a tax exemption, appeal of the determination to the board of tax adjustment may be made in the manner prescribed for appealed tax exemptions.

(2) Applications required by this act shall be filed on forms distributed to the tax assessors by the department of revenue. Such forms shall call for accurate description of the property, the value of such property, and the use of such property.

(3) Upon receipt of an application for exemption the tax assessor shall determine:

(a) Whether the applicant falls within the definition of any one or several of the exempt classifications.

(b) Whether the applicant requesting exemption uses the property predominantly or exclusively for exempt purposes.

(c) The extent to which the property is used for exempt purposes. In doing so, the tax assessor shall use the standards set forth in this chapter as applied by regulations of the department of revenue.

(d) The tax assessor shall find that the person or organization requesting exemption meets the requirements set forth in paragraphs (a) and (b) of subsection (3) of §196.193, Florida Statutes, before any exemption can be granted.

(4) In the event the tax assessor shall determine that any property claimed as wholly or partially exempt under this sec-

tion is not entitled to any exemption or to an extent other than that requested in the application, he shall notify the person or organization filing the application on such property, of that determination in writing, not later than June 1 of the year for which the application was filed. All notifications must specify the right to appeal to the board of tax adjustment and the procedures to follow in obtaining such an appeal. Thereafter, the person or organization filing such application, or a duly designated representative, may appeal that determination by the tax assessor to the board of tax adjustment at the time of its regular hearing. In the event of an appeal the assessor or his representative shall appear at the board hearing and present his findings of fact. If the applicant is not present or represented at the hearing the board may make a determination on the basis of information supplied by the tax assessor or such other information on file with the board.

Section 6. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.194 Board of tax adjustment; notice; hearings; appearance before the board.—

(1) The board of tax adjustment shall hear disputed or appealed applications for exemption, and shall grant such exemptions in whole or in part, in accordance with criteria set forth in this act, and may review exemptions on its own motion or upon motion of the tax assessor. Review of an exemption application upon motion of the board of the tax adjustment shall not be held until the applicant has had at least five (5) calendar days notice of the board's intent to review the application.

(2) At least two (2) weeks prior to the meeting of the board of tax adjustment (but no sooner than May 15), notice of the meeting shall be published in a newspaper of general circulation within the county, or if no such newspaper is published within the county, notice shall be placed on the courthouse door and two (2) other prominent places within the county. Such notice shall list:

(a) Applicants for exemption under chapter 196, Florida Statutes, that have had their application wholly or partially approved by the tax assessor with the street address, or if no

street address is available another designation of location, of the property granted the exemption, its assessed value, and the extent of the exemption granted;

(b) Applicants for exemption under this chapter that have had their applications denied by the tax assessor with the street address, or if no street address is available another designation of location, of the property so denied and its assessed value.

(3) The exemption procedures of the board of tax adjustment shall be as provided in chapter 194, Florida Statutes, except as otherwise provided in this chapter. Records of the board of tax adjustment showing the names of persons and organizations granted exemptions, the street address or other designation of location of the exempted property and the extent of the exemption granted shall be part of the public record.

Section 7. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.195 Criteria for determining profit or nonprofit status of an applicant.—

(1) Applicants requesting exemption shall supply such fiscal and other records showing in reasonable detail the financial condition, record of operation, and exempt and nonexempt uses of the property where appropriate, for the immediately preceding fiscal year as might be requested by the tax assessor or the board of tax adjustment.

(2) In determining whether an applicant for a religious, literary, scientific or charitable exemption under this act is a nonprofit or profit making venture or whether the property is used for a profit making purpose, the following criteria shall be applied:

(a) The reasonableness of any advances or payment directly or indirectly by way of salary, fee, loan, gift, bonus, gratuity, drawing account, commission, or otherwise (except for reimbursements of advances for reasonable out-of-pocket expenses incurred on behalf of the applicant) to any person, company or other entity directly or indirectly controlled by the applicant, or any officer, director, trustee, member or stockholder of the applicant;

(b) The reasonableness of any guaranty of a loan to or an obligation of any officer, director, trustee, member, or stockholder of the applicant or any entity directly or indirectly con-

trolled by such person, or which pays any compensation to its officers, directors, trustees, members or stockholders for services rendered to or on behalf of the applicant;

(c) The reasonableness of any contractual arrangement by the applicant, any officer, director, trustee, member, or stockholder of the applicant regarding rendition of services, the provision of goods or supplies, the management of the applicant, the construction or renovation of the property of the applicant, the procurement of the real, personal, or intangible property of the applicant, or other similar financial interest in the affairs of the applicant;

(d) The reasonableness of payments made for salaries for the operation of the applicant or for services, supplies and materials used by the applicant reserves for repair, replacement and depreciation of the property of the applicant, payment of mortgages, liens, and incumbrances upon the property of the applicant, or other purposes;

(e) The reasonableness of charges made by the applicant for any services rendered by it in relation to the value of those services;

(f) Each applicant must affirmatively show that no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of the members, directors, officers, or any person or firm operating for profit or for a nonexempt purpose.

(3) No application for exemption may be granted for religious, literary, scientific, or charitable use of property until the applicant has been found by the tax assessor, or upon appeal by the board of tax adjustment, to be nonprofit as defined in this section.

Section 8. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.196 Criteria for determining that portion of charitable, religious, scientific or literary property entitled to exempt status.—In the determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable, religious, scientific or literary purpose, the following criteria shall be applied:

(1) The nature and extent of the charitable, religious, scientific or literary activity of the applicant, a comparison of such activities with all other activities of the organization, and the utilization of the property for charitable, religious, scientific or literary activities as compared with other uses.

(2) The extent to which the property has been made available to groups who perform exempt purposes, at a charge that is equal to or less than the cost of providing the facilities for their use, or the extent to which services are provided to persons at a charge that is equal or less than the cost of providing such services. Such rental or service shall be considered as part of the exempt purposes of the applicant. Only those portions of property used predominantly for charitable, religious, scientific or literary purposes shall be exempt. In no event shall an incidental use of property either qualify such property for an exemption or impair the exemption of an otherwise exempt property.

(3) Except as otherwise provided herein, property claimed as exempt for literary, scientific, or charitable purposes which is used for profit making purposes shall be subject to ad valorem taxation. Use of property for functions not requiring a business or occupational license conducted by the organization at its primary residence the revenue of which is used wholly for exempt purposes shall not be considered profit making. In this connection the playing of bingo on such property shall not be considered as using such property in such a manner as would impair its exempt status.

Section 9. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.197 Additional provisions for exempting property used by hospitals, nursing homes, homes for special services, and homes for the aged.—In addition to criteria for granting exemptions for charitable use of property set forth in other sections of this act, hospitals, nursing homes, homes for special services and homes for the aged shall meet the following criteria:

(1) Homes for the aged shall be exempt only to the extent of residency in the applicant home which is actually restricted to:

(a) Persons having a gross income of not more than five thousand dollars ($5,000) per year who are sixty-two (62) years of age or older; or

(b) Couples, one of whom must be sixty-two (62) years of age or older, having a combined gross income of not more than six thousand dollars ($6,000) per year; or

(c) Persons who are totally and permanently disabled and have gross incomes of not more than five thousand dollars ($5,000) per year; or

(d) Couples, one or both of whom are totally and permanently disabled, having a combined gross income of not more than six thousand dollars ($6,000) per year.

(e) The foregoing maximum income limitations applicable to residents of homes for the aged shall be adjusted to conform to any increase in maximum income restrictions established by the United States Department of Housing and Urban Development for housing facilities for the lower income elderly financed under section 202 or 236 of the National Housing Act, or of corresponding sections of any subsequently enacted National Housing Act.

(2) Property of homes for the aged applicants shall be used in accordance with the residence restrictions as set forth in subsection (1) of this section. Those portions of such property failing to meet this requirement shall not qualify for an exemption.

(3) The extent of exemption of property of homes for the aged found to be used predominantly for exempt purposes, shall be made by dividing the total number of rental units and apartments meeting all requirements for exemption set forth in this chapter by the total number of rental units and apartments in the home. This ratio shall be the extent of exemption granted to that portion of the home's property essential to the operation and purposes of the exempt portions of the home.

(4) To the exemption granted under this subsection for the years 1972-73 shall be added the value of the property used as a residence by persons or couples not meeting the exemption requirements of this act, but whose residence agreements contain

a provision preventing the home from increasing the monthly residence charge for the payment of ad valorem taxes and which agreements were in effect on June 1, 1971.

(5) The applicant shall be a Florida corporation, not for profit, that shall have been exempt as of January 1 of the year for which exemption from ad valorem property taxes is requested from federal income taxation by qualifying as an exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code of 1954 or of corresponding section of a subsequently enacted federal revenue act.

(6) In determining the extent of exemption to be granted to institutions licensed as hospitals, portions of the property leased as parking lots or parking garages operated by private enterprise, and property used for the treatment of private outpatients shall not be deemed to be serving an exempt purpose and shall not be exempt from taxation. Hospital emergency rooms, hospital clinical facilities, and other hospital property or facilities which are leased to a nonprofit corporation which provides direct services to patients in a nonprofit or public hospital and qualifies under section 8(4) of this act are excluded and shall be exempt from taxation.

(7) Licensing by the division of health of the department of health and rehabilitative services shall not be required for tax exemption hereunder if a home for the aged applicant requires its residents to be ambulatory, furnishes no medical facilities, nursing services, or dining services to its residents, and has been as of January 1, 1970, exempt from the payment of income taxes to the United States for income derived from the operation of such home for not less than twenty (20) years.

Section 10. Educational property.—Chapter 196, Florida Statutes, is amended by the addition of a new section to read:

196.198 Educational property.—Educational institutions within this state and their property used exclusively for educational purposes shall be exempt from taxation. Sheltered workshops providing rehabilitation and retraining of disabled individuals and exempted by a certificate under section (d) of the Federal Fair Labor Standards Act of 1938, as amended, are declared wholly educational in purpose and shall be exempted from certification, accreditation and membership requirements set forth in §196.012, Florida Statutes. Those portions of property of college fraternities and sororities certified by the pres-

ident of the college or university to the appropriate tax assessor as being essential to the educational process, shall be exempt from ad valorem taxation. The use of property by public fairs and expositions chartered by chapter 616, Florida Statutes, is presumed to be an educational use of such property and shall be exempt from ad valorem taxation to the extent of such use.

Section 11. Chapter 196, Florida Statutes, is amended by the addition of a new section to read:

196.199 Exemptions for property owned by governmental units.—

(1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:

(a) All property of the United States shall be exempt from ad valorem taxation, except such property as is subject to tax by this state or any political subdivision thereof or any municipality under any law of the United States.

(b) All property of this state which is used for governmental purposes shall be exempt from ad valorem taxation except as otherwise provided by law.

(c) All property of the several political subdivisions and municipalities of this state which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law.

(2) Property owned by the following governmental units but used by nongovernmental lessees shall only be exempt from taxation under the following conditions:

(a) Leasehold interests in property of the United States, of the state or any of its several political subdivisions, or of municipalities, agencies, authorities and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal or public purpose or function, as defined in §196.012(5). In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation.

(b) Any governmental property leased to an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes shall be exempt from taxation.

(c) Nothing herein or in §192.010, Florida Statutes, shall require a governmental unit or authority to impose taxes upon a leasehold estate created prior to the effective date of this act if the lease agreement creating such leasehold estate contains a covenant on the part of such governmental unit or authority as lessor to refrain from imposing taxes on the leasehold estate during the term of the leasehold estate, but any such covenant shall not prevent taxation of a leasehold estate by any taxing unit or authority other than the unit or authority making such covenant.

(3) Property owned by the United States, by the State of Florida, or by any political subdivision, municipality, agency, authority or other public body corporate of the state which becomes subject to a leasehold interest of a nongovernmental lessee other than that described in subsection (2)(a) above on or after June 1, 1971, and the leasehold interest of such a lessee, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious or charitable purposes.

(4) No exemption granted before June 1, 1971 shall be revoked by this act if such revocation will impair any existing bond agreement.

(5) Property which is originally leased for 99 years or more, exclusive of renewal options, shall be deemed to be "owned" for purposes of this section 196.199.

(6) Nonpayment of taxes.—

(a) Any and all of the aforesaid taxes on any leasehold described in this section shall not become a lien on same or the property itself, but shall constitute a debt due and shall be recoverable by legal action or by the issuance of tax executions that shall become liens upon any other property in any county of this state of the taxpayer who owes said tax.

(b) Nonpayment of any such taxes by the lessee shall result in the revocation of any occupational license of such person or the revocation, upon certification hereunder by the tax assessor to the secretary of state, of the corporate charter of any such domestic corporation or the revocation, upon certification hereunder by the tax assessor to the secretary of state, of

the authority of any foreign corporation to do business in Florida, as appropriate, which such license, charter or authority is related to the leased property.

Section 12. Chapter 196, Florida Statutes, is amended by adding a new section to read:

196.202 Property of widows, blind persons, and persons totally and permanently disabled.—Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

Section 13. If any section, subsection, paragraph, or other provision of this act, or its application to any person or circumstance shall be held invalid or unconstitutional, such holding shall not affect the validity of any other section, subsection, paragraph, or other provision, or its application to other persons or circumstances. The legislature hereby expresses the intent that it would have enacted the other provisions of this act as if the invalid or unconstitutional provision was not contained within the act.

Section 14. All special and local acts or general acts of local application granting specific exemption from property taxation are hereby repealed to the extent that such exemption is granted provided, however, that in Broward County the tax assessor of said county is hereby authorized to make an exception to the provisions of section 192.042, Florida Statutes, requiring that property be assessed on January 1st of each year by exempting from the provisions of the general law the assessment of taxes for the year 1971 on property purchased by any non-profit religious corporation within thirty days after January 1, 1971.

Section 15. Sections 196.191, 196.201, 196.211, 196.22, 196.25, 196.275 and 196.30, Florida Statutes, are hereby repealed.

Section 16. Chapter 192, Florida Statutes, is amended by adding a new section to read:

192.010 Property subject to taxation.—Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:

(1) All real and personal property in this state, and all personal property belonging to persons residing in this state; and

(2) All leasehold interests in property of the United States, of the State of Florida, or any political subdivision, municipality, agency, authority or other public body corporate of the state.

Section 17. This act shall take effect December 31, 1971.

Approved by the Governor June 15, 1971,

Filed in Office Secretary of State June 16, 1971.

Supreme Court, U.S.
FILED
DEC 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

—v.—

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANT FLORENCE DIFFENDERFER

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANT FLORENCE DIFFENDERFER

This reply brief, submitted in behalf of the appellant Florence Diffenderfer, addresses itself to the single question: Has the case become moot by reason of the enactment by the State of Florida of Chapter 71-133, 1971 Laws, Second Legislature?

I. The Appeal Has Not Been Rendered Moot

On February 28, 1971, this Court noted probable jurisdiction to the appeal in this case which presented the following question:

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

On June 15, 1971, the Governor of Florida signed into law Chapter 71-133, the effect of which is to render subject to ad valorem taxation church-owned property to the extent that it is used for other than church purposes. This, it may be presumed, means that after the effective date of the new statute the parking lot owned and operated by the appellee Central Baptist Church of Miami will become subject to pro rata taxation.

The appellant Florence Diffenderfer does not challenge the constitutionality of the new statute. We do not contend that if any part of church-owned property is used for commercial purposes the Constitution forbids exemption to that part which is used for worship or as a necessary adjunct thereto. We concede that a parking lot adjacent to

a church may be within the purview of *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) to the extent that it is used by worshippers while in church.

This, however, does not make the present case moot or require dismissal of the appeal herein. When the Court noted probable jurisdiction, it thereby ruled that a substantial Federal question of national significance and importance was present which called for resolution by the Court. It can hardly be denied that the question whether "the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church-owned commercial business enterprises" is one of national importance which should be answered definitively and can only be so answered by this Court.

We recognize, of course, that this fact alone may not be sufficient to save the present appeal from dismissal for mootness. It may well be that in some cases mootness may remove an appeal from the "case or controversy" category and thus perhaps affect the Court's jurisdiction under Article III of the Constitution. We submit, however, that the present appeal is not vulnerable to dismissal for mootness for the following reasons:

1. The new statute is not yet operative. Section 17 thereof provides that "This act shall take effect December 31, 1971." (See Suggestion by the Attorney General, p. 15.) At the very least, therefore, a determination of the appeal herein adverse to the appellee Central Baptist Church would render it liable for the taxes for the current year. This alone is sufficient to remove any taint of possible mootness from the case. *Powell* v. *McCormack,* 395 U.S. 486, 495-500 (1969).

2. Under Florida law, the appellee Central Baptist Church is liable for three years' back taxes should the appellants prevail in this suit. Section 193.23 Fla. Stat. F.S.A. provides in part as follows:

> When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment for such property for the current year * * * .

Appellant Central Baptist Church does not cite this section in its brief, but cites instead two Florida decisions, *Coppock* v. *Blount,* 145 So.2d 279 (Fla. App. 3d 1962) and *City of Naples* v. *Conboy,* 182 So.2d 412 (Fla. 1965). Neither of these decisions, however, effects a judicial repeal of Section 193.23. These cases hold only that *where special circumstances exist* the State may be estopped on equitable principles from seeking to recover back taxes under an exemption law declared to be inapplicable or unconstitutional. Thus, in *Coppock* v. *Blount,* the court noted:

> Plaintiffs further allege that the defendants knew back in 1957 that the school was being operated through a corporation on the real property of the plaintiffs, Lorin F. Coppock, Jr., and Lucille W. Coppock, his wife, and yet continued to grant the plaintiffs the exemption afforded educational institutions; that had the defendants informed the plaintiffs of their intention not

> to grant the exemption because the operation of the school had been separated from the ownership of the real estate on which it was situated, *plaintiffs could have obviated the problem by either dissolving the corporation or by conveying the real estate to the corporation.* (145 So.2d at 280. Emphasis added.)

Similarly, in *City of Naples* v. *Conboy,* the Florida court noted (at 182 So.2d 418) that

> * * * The city has affirmatively acted in assessing taxes as agreed under the contracts with the various developers over a period of years and it is reasonable to believe that the developers have long acted in reliance thereupon. * * *

In the present case there are no special circumstances upon which equitable estoppel can be based, and nothing in either Florida decision can be interpreted as meaning that notwithstanding the express language of Section 193.23 back taxes cannot be collected after an exemption statute is declared unconstitutional.

Since the appellee Central Baptist Church remains liable for at least three years back taxes, the appeal herein is not moot. *Powell* v. *McCormack, supra; Bond* v. *Floyd,* 385 U.S. 116, 128 (1966).

3. Even if the State of Florida is estopped from or chooses not to enforce a claim for back taxes, the appellants are not barred from asserting nor this Court from declaring the appellee Church's liability therefor. Under *Flast* v. *Cohen,* 392 U.S. 83 (1968), the appellants herein had standing to bring this suit because as taxpayers they were injured by the exemption accorded in violation of the Estab-

lishment Clause. This was an injury separate from and independent of that suffered by the State of Florida by reason of its non-collection of moneys due it. It is, we submit, within the competence of this Court under the Supremacy Clause of the Constitution (Article VI) to grant at least declaratory relief for the violation of the plaintiffs' constitutional rights notwithstanding the waiver or estoppel on the part of the State.

CONCLUSION

For the reasons stated, the appeal herein is not moot and should be decided on the merits.

Respectfully submitted,

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November, 1971.

DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 70–47. Argued December 6, 1971—Decided January 10, 1972

Appellants brought suit for declaratory and injunctive relief challenging under the Religion Clauses of the First Amendment, a Florida statute to the extent that it authorized a tax exemption for a church parking lot used, *inter alia*, for commercial purposes. *Held:* The subsequent repeal of the challenged statute and enactment of new legislation make the relief sought inappropriate. The District Court's judgment upholding the statute is vacated and the case is remanded with leave to appellants to amend their pleadings if they desire to attack the new statute or show that the old statute retains some force.

316 F. Supp. 1116, vacated and remanded.

Leo Pfeffer argued the cause for appellant Diffenderfer. With him on the brief were *Richard Yale Feder, Irma Robbins Feder,* and *Melvin L. Wulf. Howard J. Hollander* argued the cause and filed a brief for appellant Paul.

Charles M. Whelan argued the cause for appellee Central Baptist Church of Miami. With him on the brief were *Herbert S. Sawyer, Karl B. Block, Jr.,* and *William R. Consedine.*

Franklin C. Salisbury and *Noel H. Thompson* filed a brief for Protestants and Other Americans United for Separation of Church and State as *amicus curiae* urging reversal. *Robert L. Shevin,* Attorney General of Florida, *pro se,* filed a memorandum.

PER CURIAM.

This is an action for a declaratory judgment that Florida Statutes § 192.06 (4) (1967) violates the First Amendment to the Constitution of the United States

sofar as it authorizes a tax exemption for church prop-
ty used, *inter alia*, as a commercial parking lot, and for
injunction requiring appropriate state and local offi-
als to assess and collect taxes against such property. It
brought by citizens and taxpayers of Dade County,
orida, where the property in question is located. The
ux of their complaint is that state aid in the form of a
x exemption for church property used primarily for
mmercial purposes amounts not only to an establish-
ent of the one religion aided, but also to an inhibition
the free exercise of other religions. A three-judge
istrict Court, convened pursuant to 28 U. S. C. §§ 2281,
84, upheld the validity of the statute as applied to the
operty involved herein, 316 F. Supp. 1116 (1970), and
aintiffs appealed to this Court. 28 U. S. C. § 1253.
e noted probable jurisdiction on March 1, 1971, 401
S. 934.

The Central Baptist Church of Miami, Florida, Inc.,
the owner of nearly a full square block of land in
wntown Miami which is occupied by church buildings
d an offstreet parking lot. The parking facilities are
ilized by numerous persons pursuing a variety of church
tivities. These facilities are also used as a commercial
rking lot every day except Sunday. At the time this
it was instituted and decided in the District Court, Fla.
at. § 192.06 (4) provided for exemption from taxa-
on of:

> "All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial . . . ."

Prior to the decision of the District Court, the Florida
preme Court had held, in a case involving the same
operty as is involved here, that church parking lots

retain their full tax exemption under state law even though they may be used for commercial as well as church purposes. *Central Baptist Church* v. *Dade County*, 216 So. 2d 4 (1968). This led to the constitutional challenge in the District Court.

At its 1971 Regular Session, the Florida Legislature repealed § 196.191 (the 1969 successor to § 192.06) and enacted new legislation, approved June 15, 1971, effective December 31, 1971, which provides, in relevant part, that church property is exempt from taxation only if the property is used predominantly for religious purposes and only "to the extent of the ratio that such predominant use bears to the non-exempt use." Fla. Stat. § 196.192 (2).

We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered. *Hall* v. *Beals*, 396 U. S. 45, 48 (1969); *United States* v. *Alabama*, 362 U. S. 602, 604 (1960); cf. *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281–282 (1969); *Hines* v. *Davidowitz*, 312 U. S. 52, 60 (1941). It is clear that the church parking lot which was the subject of the taxpayers' complaint is no longer fully exempt from taxation. If, in fact, it can be demonstrated that the lot is predominantly used for nonreligious purposes, it will receive no exemption whatever. "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, *supra*, at 48.

This is not a case that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), nor is it the kind of case that may produce irreparable injury if not decided immediately; see, *e. g.*, *Moore* v. *Ogilvie*, 394 U. S. 814 (1969); *Gray* v. *Sanders*, 372 U. S. 368 (1963). The only relief sought in the complaint was a declaratory judgment that

the now repealed Fla. Stat. § 192.06 (4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.

Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court, *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39, and n. 2 (1950), we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings. *Bryan* v. *Austin*, 354 U. S. 933 (1957).

Judgment will be entered accordingly.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

The extent to which a State may constitutionally authorize a tax exemption for church-owned property used primarily for commercial purposes is a question of substantial national importance, and is squarely presented by appellants' challenge to Fla. Stat. § 192.06 (4) in this case. The Court says, however, that the controversy over the exemption awarded appellee Church is moot, appellants having asked only for declaratory relief as to the unconstitutionality of § 192.06 (4), which section was replaced by new legislation, effective December 31, 1971, that substantially narrowed the authorized exemption. Fla. Stat. § 196.192.

I am not as eager as is the Court to hold moot a case on appeal which is justiciable in every respect save for an

intervening change in the underlying law. It does not necessarily follow that there is no longer a live controversy between these parties, even if we assume, *arguendo*, that the new statute satisfies all of appellants' constitutional objections to the old one. Here, appellants argue that should their appeal prevail, the Church will be liable for three years' back property taxes, pursuant to Fla. Stat. § 193.23, now § 193.092.[1] If this is so, the controversy would appear vital despite the repeal of § 192.06 (4). Cf. *Powell* v. *McCormack*, 395 U. S. 486; *Bond* v. *Floyd*, 385 U. S. 116. See also Note, 83 Harv. L. Rev. 1672 (1970).

Appellees contest this interpretation of state tax law, arguing from state court decisions that state or local taxing authorities would be estopped from asserting appellee church's liability for back taxes.[2] Neither side, however, can point to a definitive interpretation of the precise point of state law at issue.

In my view, this situation lends itself to the Florida procedures by which this Court and other federal appellate courts may certify unresolved questions of Florida

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[1] Fla. Stat. § 193.092 reads, in pertinent part:

"(1) When it shall appear that an ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year . . . ."

[2] See, *e. g.*, *City of Naples* v. *Conboy*, 182 So. 2d 412 (Fla. 1965); *Coppock* v. *Blount*, 145 So. 2d 279 (Fla. App. 1962). Appellants, however, construe these cases to hold that back taxation may be estopped on equitable principles only when there are "special circumstances" involved. Appellants contend that the present situation involves no such "special circumstances" that would justify an estoppel under these cases.

law to the State Supreme Court for decision.[3] If a declaration that § 192.06 (4) was unconstitutional would result in tax liability to appellee church, then this case is surely not moot. We have the opportunity to ask the Florida Supreme Court for a definitive answer to this question. I would take advantage of it.

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[3] Certification is authorized by Fla. Stat. § 25.031 (1969):

"The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

The implementing rule is Fla. App. Rule 4.61. We have used this statute before, noting that it demonstrates "rare foresight" on the part of the Florida Legislature. *Clay* v. *Sun Ins. Office*, 363 U. S. 207, 212.